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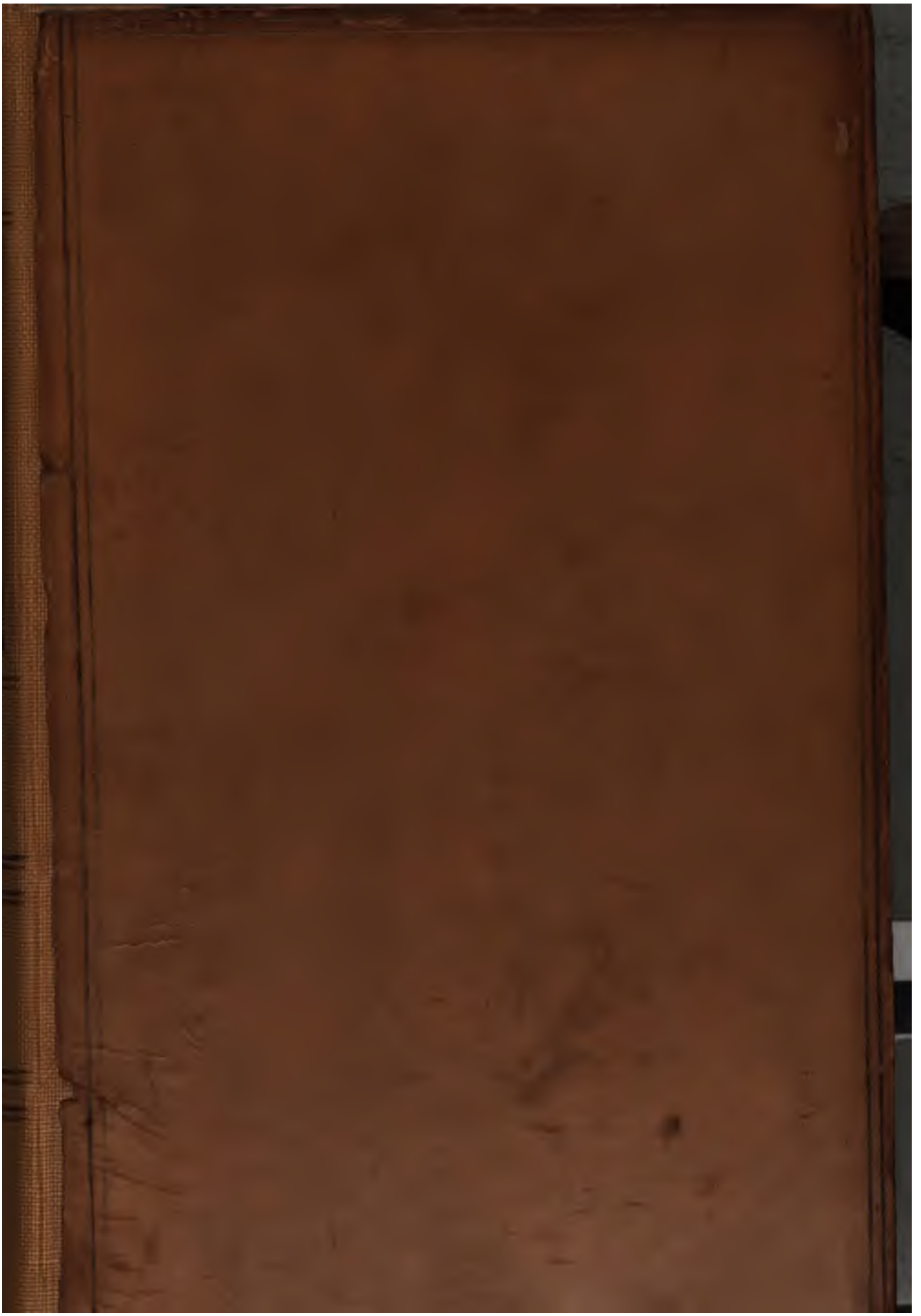

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CASES

DECIDED IN

THE HOUSE OF LORDS,

ON

APPEAL FROM THE COURTS OF SCOTLAND.

4° & 5° VICTORIÆ,

SESSION OF PARLIAMENT 1842.

VOL. I.

REPORTED BY

SYDNEY S. BELL,

OF THE INNER TEMPLE, BARRISTER AT LAW.

By Appointment of the House of Lords.

WILLIAM BLACKWOOD AND SONS, EDINBURGH;
SAUNDERS AND BENNING, LONDON.

1843.

EDINBURGH:
PRINTED BY ANDREW SHORTREDE,
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LORD CHANCELLOR,

LORD LYNDHURST.

Appointed September, 1841.

ATTORNEY GENERAL,

SIR FREDERICK POLLOCK,

Appointed September, 1841.

SOLICITOR GENERAL

SIR WILLIAM WEBB FOLLET,

Appointed September, 1841.

LORD ADVOCATE,

THE RIGHT HONOURABLE SIR WILLIAM RAE, BART.

Appointed September, 1841; *Died 18th October*, 1842; *succeeded by*

DUNCAN M'NEILL, ESQ.

SOLICITOR GENERAL,

DUNCAN M'NEILL, ESQ.

Appointed LORD ADVOCATE October, 1842; *succeeded by*

ADAM ANDERSON, ESQ.

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ASSIGNATION.

An obligation by a disponer of lands to relieve the disponee of all future augmentations of stipend, in order to be effectual to singular successors in the lands, must be specially assigned, and will not be vested in them as a part and pertinent, nor by virtue of a general assignation to writs, &c. Maitland *v.* Horne, 1

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A bill for payment of the price of goods, drawn upon a party who had gratuitously undertaken their disposal, but had afterwards left it in the hands of another party, who was to account to him, is not, while the result of the sales is as yet unascertained, an accommodation bill, but one which the acceptor must pay; his relief, in case of over-payment, being on the ultimate taking of the account. Gibson *v.* Rutherglen & Co. . . 519

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The Lord Advocate, suing on behalf of the Crown, or of any officers in whom the revenue of the Crown is vested, is not liable for costs of the action, whether competently or incompetently brought in its form, or otherwise. Lord Advocate *v.* Dunglas, ... 93

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INHIBITION — *continued.*

passu ranking with the other creditors, in whose favour the ranking and sale operated as a general adjudication for behoof of all, was entitled to draw back from the heritable creditor such a sum as would increase her dividend to what it would have been had his debt not been in the field; but that she was not entitled to have the benefit of the heritable creditor's security to the effect of drawing full payment out of the money drawn by the heritable creditor. H. Gordon *v.* Campbell, . . . 563

INTEREST.

Where possession of land was given for the purpose of forming a canal, under an agreement to pay compensation for the value of stone supposed to be under the land, so soon as the existence of the stone should be disclosed, *held*, that interest was not due from the time of obtaining possession, but from the time at which the existence of the stone and its quality was ascertained. Edinburgh and Glasgow Union Canal Company *v.* Carmichael, 316

JURISDICTION.

1. A statute enabling a Water Company to levy certain rates on the inhabitants of a city, and declaring, that "all actions, or suits "relative to this act, and all fines, penalties," &c. should be sued for by summary complaint before the Sheriff, and should not "be subject to the review of any court or courts, whatever," *held* to exclude the jurisdiction of the Court of Session, over an action put into a declaratory form, as to the rights of the Company to levy the rate after a certain mode. Balfour *v.* Malcolm, 153
2. Where there is a question, as to whether matter in dispute is within exclusive statutory jurisdiction conferred on an inferior court, suspension is competent without abiding the issue of the proceeding in the inferior court, and although a jury may even have been sworn to try the question. Reddie *v.* Todd, . 459
3. Matter not within exclusive statutory jurisdiction *held* not to have been brought within it by waiver of parties. S.C.

MARRIAGE.

1. Circumstances adduced to prove marriage by habit and reputation *held* not to establish a habit and reputation of that general and uniform character which is necessary to constitute marriage. Hamilton *v.* Hamilton, ... 736
2. Circumstances, *held* to prove that a letter, purporting to be an acknowledgment of marriage, had been seen and assented to by the woman, and to constitute a marriage between the parties, notwithstanding evidence of another purpose, on the part of the man, previous to making the letter. S.C.
3. Delivery to a third party of a letter acknowledging marriage, the letter having been seen and assented to by the woman, makes the third party a trustee for the woman, and is equivalent to delivery to herself. S.C.

MINOR. See *Passive Titles*, 1.

MORA. See *Cautioner*, 3.

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PASSIVE TITLES.

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PATENT.

Use of an invention in England previous to the grant of a Scotch patent in regard to the same invention, voids the patent. Brown *v.* Annandale, ... 70

PATRONAGE.

1. *Held*, that a deed by the patrons of a parish, (the heritors and elders of which had paid to the patrons the 600 merks prescribed by the act 1690, without having received the renunciation prescribed by that act,) executed subsequent to the 10th Anne, cap. 12, and conveying to the heritors and kirk-session the right of presenting a minister, conveyed the ordinary right of patronage as restored by the 10th of Anne, and did neither complete nor confer the right of popular election intended by the act 1690. Cullen *v.* Sprot, ... 595
2. *Held*, that a right of patronage vested in the heritors and kirk-session of a parish, is to be exercised by deed of presentation, not by vote at public meeting. S.C.

PENSION. See *Crown*, 1.

PRESCRIPTION.

1. Where purchasers, under a ranking and sale, had granted bond for their purchase-money, payable at a definite term, and "that "to those who shall be found to have right thereto by the "decreet of ranking;" and no claim for payment or otherwise had been made upon the purchasers for upwards of forty years, *found*, that creditors before any decree of ranking had been made, were not, in the circumstances, entitled to an order for

PRESCRIPTION — *continued.*

consignation upon the purchasers, under the 6th sect. of 54 Geo. III. cap. 137. Dickson *v.* Brander, . . 167

2. Possession for forty years of lands *de facto* bounded by the sea-shore, but described in the titles as bounded by a sea wall, will not avail the possessor so as to work off the effect of the limitation in his boundary, and entitle him to claim a right of making land beyond the walls, about to be gained from the sea by artificial operations, his own property. Kerr *v.* Dickson, . 499

PRINCIPAL AND AGENT.

A party who had gratuitously undertaken the disposal of goods in a foreign country, whither he was going on business of his own, being unable to conclude the business before leaving the country, left it in the hands of an agent, with instructions to remit the proceeds to himself, *held*, that he was liable, while the result of the sales was as yet unascertained, to pay a bill which he had accepted for the price of the goods. Gibson *v.* Rutherglen & Co. 519

PRINCIPAL AND SURETY.

Terms of bond by surety for an agent, *held* not to be such as to give the surety notice of, and make him liable for, intromissions with the monies of the principal previous to the date of the agent's appointment. Napier & Co. *v.* Bruce, . . . 78

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2. Under a summons, seeking to make the defender liable on a universal representation under the passive titles, it is competent to decern against him on a limited liability. Bremner *v.* Campbell, ... 280

3. It is not competent, after the record is closed, to ask by supplementary summons, for interest on the sums concluded for in the original libel. Edinburgh and Glasgow Union Canal Co. *v.* Carmichael, ... 316

4. A defence to the competency of a supplementary action *held* to be sufficiently embraced by the prayer of a reclaiming note, so as to have effect given to it, notwithstanding the conjunction of the supplemental with the original action. S. C.

5. Sufficiency of libel to support judgment. Dunglas *v.* Officers of State, ... 537

PROOF.

It is competent for a Court exercising equitable powers, to receive

PROOF — *continued.*
evidence to shew that a written contract, purporting to be an absolute conveyance, was intended as a security only, and to deal with it accordingly. Scottish Union Insurance Company *v.* Queensberry, ... 183
See also *Deed*, 1 and 2.

PROPERTY.
The proprietor under a bounding charter of land immediately adjoining the sea-shore, has no right in the shore beyond his boundary. Kerr *v.* Keith, ... 499

PUBLIC OFFICER.
1. In the absence of any proof of usage to the contrary, *held*, that the appointment of clerk to the Convention of Royal Burghs, (a body of an anomalous character, partaking in some respects of corporate qualities,) without any express term of endurance, did not necessarily import an appointment for life. General Convention of Royal Burghs *v.* Cunningham, . . 628
2. Where the salary of an officer of a public body, was the subject of an annual vote, — *Held*, that the body had a right to regulate the amount of salary, by increase or reduction, at its pleasure. S. C.
See also *Crown*, 1.
See also *Courts*.

RAILWAY. See *Statute*, 2.

RANKING AND SALE. See also *Inhibition*.
If the creditors do not insist upon consignation by the purchasers of the lands within forty years from the term at which the price is payable, under the purchaser's bond, their right to do so will be cut off by the negative prescription. Dickson *v.* Brander, 167.

REAL AND PERSONAL. See *Tailzie*, 5.

RECLAIMING NOTE. See *Process*, 4.

RES JUDICATA.
1. Held, that a decision in competing actions for the fee-simple of lands, as given by different deeds, did not form *res judicata* against the unsuccessful party in these actions subsequently seeking to establish that the successful party must hold under the fetters of an entail created by the same deeds. Fraser *v.* Lord Lovat, ... 105
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REVOCATION. See *Deed*, 3.

SALE. See also *Trust*, 4.

1. Contract held to amount to a security only, and not to a sale out and out. Scottish Union Insurance Co. *v.* Queensberry, 183
2. Terms of contract *held* not to import a sale of stone under land, but merely an agreement for compensation, in respect of a use of the land, whereby the working of the stone was rendered impracticable. Edinburgh and Glasgow Union Canal Co. *v.* Carmichael, ... 316
3. *Held*, that the purchaser of the whole executry of a party, as it should exist at her death, in consideration of an annuity, was entitled to retain arrears of the annuity as part of the seller's executry. Stewart *v.* Stewart, . . . 796

SECURITY. See *Sale*, 1.

SEQUESTRATION. See *Bankrupt*.

STATUTE.

1. The efficacy of a private Act of Parliament is no way dependent on the circumstance of previous notice of the intention to apply for it having been given to the parties whose rights are affected by it. Edinburgh and Dalkeith Railway Co. *v.* Wauchope, 252
2. Where a statute for the construction of a railway declared, that it should not prevent the owners or occupiers of ground through which the railway might pass, from carrying any railway, or other road, which such owner or occupier was authorized to make, across the main railway, "within the lands of such owner or "occupier," *held*, that the privilege was not confined to the state of the ownership or occupancy at the date of the act. Monkland and Kirkintulloch Railway Co. *v.* Dixon, . . 347

Construction of. Edinburgh and Dalkeith Railway *v.* Wauchope, 252

STIPEND. See *Warrandice*.

SUSPENSION. See also *Jurisdiction*, 2.

A party raising by suspension a question, confined to his *liability* under an agreement, cannot, in the same process, be relieved in regard to the *manner* in which the liability is attempted to be enforced. Baird and Co. *v.* Neilson, . . 219

TAILZIE.

1. Whether a party having a mere personal right to lands can validly make a procuratory of resignation as the basis of an entail. *Query*. Renton *v.* Anstruther, . . . 129
2. Under a destination to "heirs-male of the body, and the heirs "whatsoever of the body of the said heirs-male," *found*, that the heirs-male did not require to be exhausted, before the heirs whatsoever of the body of the first heir-male of the body could take. Lockhart *v.* Macdonald, . . . 202
3. Terms of entail held not to impose fetters upon the institute,

TAILZIE — *continued.*
against altering the order of succession. Carrick, *v.* Buchanan, ... 368
4. Whether a gratuitous *mortis causa* deed by an institute, altering the order of succession prescribed by an entail, which, as to the institute, was defective in the irritant clause, is good against the substitutes. Remit for the opinion of the Court below. S.C.
5. Legacies bequeathed by an entailer, held not to have been given in terms which made them burdens on the entailed lands, for which the lands could be adjudged, but so only as to make them payable by the heirs of entail, as they should successively come into possession of the lands. Kerr *v.* Keith, . . 386
6. An heir making improvments on lands, possessed by him under an unrecorded entail, is not entitled to the benefit of the Act 10 Geo. III. cap. 51, in regard to the cost of the improvements. Macdonald *v.* Macdonald, ... 819
7. The limitation in the 26th section of 10 Geo. III. cap. 51, does not apply to actions in regard to improvements made by an heir possessing under an unrecorded entail. S.C.

TITLES. See *Tailzie*, 1.

TRUST.
1. *Found*, that an heritable bond by trustees, which acknowledged receipt of money, and bound them *qua* trustees to repay it, and contained a clause for registration, in order to execution in common form, did not infer a personal liability against the trustees, beyond their possession of trust funds. Gordon *v.* Campbell, 428.
2. A trustee, under a deed of arrangement between an insolvent and his creditors, whereby the whole of the insolvent's *acquisita et acquirenda*, were vested in the trustee, for payment of the creditors, if, while the trust is subsisting, he acquire right to a subsequent debt contracted by the insolvent, does so for the trust, and must communicate to it all the benefit of the acquisition. Hamilton *v.* Wright, ... 574
3. A trustee must not put himself in a position which may have a tendency to injure the trust, or interfere with his duty. S.C.
4. A purchase by a trustee, under a trust for payment of creditors, of a debt owing by the insolvent, will be void by reason of the knowledge which his position as trustee enables the purchaser to acquire. S.C.
See also *Marriage*, 3.

WARRANDICE.
An obligation by a disponer of lands to warrant the disponee against future augmentations of stipend, does not come within the warrandice of the title to the lands, but is an obligation collateral to, and irrespective of, the title. Maitland *v.* Horne, 1.

WRIT. See *Marriage*, 3.

CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1842.

[*7th May*, 1840, and 21*st Feb.* 1842.]

The RIGHT HONOURABLE JAMES VISCOUNT MAITLAND and Others, Trustees of the late JOHN MARQUIS OF BREADALBANE, Appellants.

WILLIAM HORNE, Esq. of Scouthill, Advocate, Respondent.

Assignation — Parts and Pertinents. — An obligation by a disponer of lands to relieve the disponee of all future augmentations of stipend, in order to be effectual to singular successors in the lands, must be specially assigned, and will not be vested in them as a part and pertinent, nor by virtue of a general assignation to writs, &c.

Warrandice. — An obligation by a disponer of lands to warrant the disponee against future augmentations of stipend, does not come within the warrandice of the title to the lands; but is an obligation collateral to, and irrespective of, the title.

THIS case regarded the right of the respondent to be relieved by the appellants, of augmentations of stipend drawn from three parcels of land possessed by him, viz. Sybsterwick, Wedderclett,

and Hausters, and depended upon the terms of the title, under which the respondent had acquired these lands.

On the 28th day of December, 1675, John Campbell of Glenorchy, and Francis Sinclair of Stircock, entered into a contract of wadset, whereby, on the narrative that as Sinclair had lent to Campbell 20,245 merks, 4s. 4d. Scots, therefore Campbell, with consent of the Earl of Caithness, "sold, annaillied, wadsett, "impignoratt, and disponed, and by the tenor hereof, all w^t one "consent and assent, as said is, sell, annailie, wadsett, impig- "norat, and dispone, to the said Francis Sinclair of Stircock, "in liferent, during all the days of his lifetime, and to the said "Patrick Sinclair, his son, and the heirs-male lawfully to be "procreat of his body; w^h failing, to the s^d Patrick Sinclair, his "other nearest heirs and assignees, in fee, heretably, redeemably "always, and under reversion to the said John Campbell of "Glenorchy, and w^t and under the other provisions and condi- "tions after spect, conceived in favours of the s^d Francis Sinclair, "in manner after exprest, All and Haill the lands of Subster- "Wick, Wedderclett, and Hauster, w^t all and sundry houses, "biggings, yards, and orchyeards, mosses, muirs, meadows, pas- "turages, grassings, sheilings, parks, woods, inclosures, ports, "havens, creiks, harbors, fishings, and fish-boats, annexis, con- "nexis, dependencies, tenants, tenandries, service of free tenants, "parts, pendicles, and pertinents of the samen haill lands, all "presently occupied and possess'd by the persons after-named."

After the description of the lands, the contract contained an obligation to infeft, a procuratory of resignation, and a clause of warrandice, which in part was expressed as follows: — "Whilks "infeftments above written, shall bear and contain the warran- "dice following, likeas now as if the said infeftments were "already past and expede, and then, as now, the said John "Campbell of Glenorchy faithfully binds and oblidges him, his "heirs and successors, to warrand, acquit, and defend the land,

" teynds, and others above-written, w^t y^e pertinents, according " as the samen are hereby disponed and wadset, in manner " above-mentioned, w^t this present disposition, and rights thereof, " and infeftments to follow hereupon, to be free, safe, and sure, " to the s^d Francis Sinclair, and his said son, and his foresaids, " from all and sundry wards, reliefs, non entries, marriages, " ladies terces, conjunct fees, liferents, annualrents, prior aliena- " tions, dispositions, and wadsets, privat and public seasines, " tacks, assedations, long or short escheits, forfaltures, bastardies, " recognitions, disclamations, purprestures, inhibitions, interdic- " tions, evictions, apprysings, adjudications, reductions, impro- " bations, bygone rents, taxations, and impositions, tack-duties, " teynd-duties, great and small, parsonage and vicarage, or of " whatsomever denomination the same be of, w^t the annuities of " teynds, bishop's quarters, ministers' stipend, reader's and " schoolmaster's stipends, and augmentations thereof, and gene- " rally from all other perils, dangers, and inconveniences w^tsom- " ever, as well not named as named, bygone, present, and to " come, whereby the said Francis Sinclair and his said son or " his fors^ds, may be any ways troubled, hindred, or impeded in " the peaceable possession of the lands, teynds, and others above " written, with their pertinents; or in uplifting the maills, farms, " profits, and duties thereof; or in selling, raising, using, or " disponing thereupon, in all time coming, at y^r pleasure, during " the not redemption y^rof, by virtue of the reversion after spect, " at all hands whatsomever, and ag^st all deadly: Likeas, y^e said " John Campbell of Glenurchy binds and obliges him, and his " foresaids, to warrant and relieve the said Francis Sinclair, and " his said son, and his foresaids, of all tack-duties, teynd-duties, " ministers' stipends, reader's and schoolmaster's stipends, and " augmentations thereof, and oy^r burdens w^tsomever, w^ch may be " imposed on or creav'd furth of the saids lands or teynds at any " time hereafter, during the not-redemption thereof, except alle-

" narly, the lien of excise, and annuity of teynds, which shall be " due and payable furth of the lands, teinds, and oyrs above " written, furth and frae the term of Whitsunday last, and in " time coming, during the said not-redemption; and also ex- " cepting such cess taxations, and oyr public burdens which shall " happen to be imposed upon the said lands by ye Parliament, " or any Convention of Estates, which the said Francis Sinclair, " and his said son, and the sds lands and teynds are to pay and " bear the burden of, furth and frae the said term of Whitsun- " day last bypast, and in time coming, during the not-redemp- " tion of the samen lands and teinds;—which assignation and " right of ye foresaids teynds, the said John Campbell of Glen- " orchy binds and obliges him, and his foresaids, to warrand to " be good, valid, and sufficient to the sd Francis Sinclair, and " his said son, and his foresaids, at all hands whatsomever, and " against all deadly; and if at any time during the said not-re- " demption, the tacks and oyr rights of the teynds of the lands " and others foresaids, now standing in the person of the said " John Campbell, shall expire, the said John Campbell binds " and obliges him, and his foresaids, to procure the same re- " new'd from time to time, during ye sd not-redemption, and to " transmit the right thereof in favours of the said Francis Sin- " clair, and his said son, and his foresaids, wtout paying any " entrie, tack-dutie, or other duty or gratuity yrfor: And sicklike, " the said John Campbell, wt consent foresaid of the said noble " Earl, and his said lady, and they all with one consent and " assent, have, during the sd not-redemption, assigned, trans- " ferred, and dispon'd, and by ye tenor hereof transfer, assign, " and dispone, to the sd Francis Sinclair, and his said son, and " his foresaids, all and sundry dispositions, contracts, charters, " infeftments, pro'ries, and instruments of resignation, precepts, " and instruments of sasine, and other rights and securities, " already made and granted to the said John Campbell, or any

" of his authors, or which he shall hereafter acquire, or to the " said noble Earl, and his said lady, of and concerning the lands, " teynds, and others, a'written w^t^ the pertinents."

Infeftment passed upon this wadset, in favour of Francis and Patrick Sinclair.

On the 16th June, 1706, John Lord Glenorchy, the son of John Campbell of Glenorchy, who, after 1675, had become Earl of Breadalbane, and Francis Sinclair, entered into an agreement by minute, for the purchase by Sinclair of the reversion of the above wadset.

On the 28th of March, 1715, Lord Glenorchy and Francis Sinclair executed a contract, which, after describing Lord Glenorchy as " heritable proprietor of the lands and others under- " written, and as having right, by disposition and assignation " from an Noble and potent Earl, John Earl of Breadalbane " and Holland, &c. his father," and reciting the wadset of 1675, proceeded thus:

" And now, seeing the said Francis Sinclair, now of Stir- " cock, has at and for the making hereof advanced, paid, and " delivered to the said John Lord Glenorchy the sum of eight " thousand, eight hundred merks Scots money, as the agreed " price and adequate value of the reversion of the lands and " teinds above specified, with the pertinents contained in the " said wadset, which sum, with the foresaid sum of twenty thou- " sand, two hundred and forty-five merks, four shillings, four " pennies Scots, for which the same were wadset, and the fore- " said sum of four hundred merks expended for passing infeft- " ment thereon, with the annualrents thereof, from the said term " of Candlemas, 1676 years, extends to the full value, worth, " and price of the heritable and irredeemable right and property " of the said haill lands, teinds, and others above-mentioned, " wherewith the said John Lord Glenorchy holds himself well " content and satisfied, and renounces hereby all objections and " exceptions of the law proponable on the contrary for ever:

" Therefore, the said John Lord Glenorchy, as having the good " and undoubted right to the reversion contained in the said " contract of wadset, and to the irredeemable right and property " of the lands, teinds, and others thereby wadset, for himself, " his heirs and successors whatsomever, by thir presents, not " only renounces and discharges all right of reversion, redemp- " tion, or regress whatsomever competent to him or his foresaids, " any manner of way, by the foresaid right or otherways, of the " lands, teinds, and others contained in the said wadset, and " exoners and discharges the said Francis Sinclair, his heirs and " successors, and all others the heirs and representatives of the " said deceased Francis and Pat. Sinclairs thereof, and of all " obligements and conditions of reversion granted by them, or " any of them, anent the redemption of the said lands and teinds; " and in like manner of the sum of thirty-one pounds, twelve " shillings Scots money, of yearly duty, payable by the foresaid " wadset right to the said John Earl of Breadalbane, and now " to the said John Lord Glenorchy, as deriving right from him, " and that as well of all years and terms bygone, as in all time " coming, and of all action, instance, pursuit, and execution, " competent, or that may be any ways competent, to the said Earl, " or to the said John Lord Glenorchy, any manner of way, for " or upon the said reversion, or for the said superplus yearly " rent and duty of thirty-one pounds, twelve shillings Scots, and " binds and obliges him, his heirs and successors foresaid, to " warrant the foresaid renunciation and discharge of the said " reversion and superplus rent and duty at all hands, and against " all deadly: Excepting from the warrandice of the discharge " of the superplus duty all former partial receipts and payments " thereof, which, with the foresaid discharge, are nowise to infer " double payment and warrandice, but only one and single: But " also of new, for the causes foresaid, to have sold, annalzied, and " disponed, likeas the said John Lord Glenorchy, in corrobora- " tion of the foresaid contract of wadset, and but any hurt, pre-

" judice, or derogation thereto in any sort, but in farther fortifi-
" cation thereof, in so far as the same may remain and be made
" use of for farther strengthening and securing the principal
" right of the purchase now acquired by the said Francis Sinclair,
" for him, his heirs and successors foresaid, sells, analzies, and
" dispones, to and in favours of the said Francis Sinclair, his
" heirs and successors whatsomever, heritably and irredeemably,
" without any manner of redemption, regress, or reversion
" whatsoever, all and haill the lands, teinds, and others above
" and after-mentioned, with their pertinents, viz.: All and haill
" the said town and lands of Substerwick, *alias* Subbuster, the
" said town and lands of Wedderclett, and the said town and
" lands of Hauster, *alias* Hasbuster, with all and sundry houses,
" biggings, yeards, orchyeards, mosses, muirs, meadows, pastur-
" ages, grazings, sheallings, parks, woods, and inclosures, ports,
" havens, crooks, and harbours, fishings, and fish-boats, annexis,
" connexis, dependencies, tenants, tenandries, and service of free
" tenants, parts, pendicles, and universal pertinents of the same
" lands whatsomever, conform to use and wont, all lying within
" the parish of Wick, and sheriffdom of Caithness; together
" with the haill parsonage teinds and teind sheaves of the saids
" haill lands, with their pertinents; together also with all right,
" title, interest, claim of right, property, and possession, as well
" petitory as possessory, which the said John Lord Glenorchy,
" or his predecessors, cedents, or authors, had, have, or any
" ways may have, claim, or pretend to the said lands, teinds,
" and pertinents thereof, or any part of the same in time
" coming." (Here followed an obligation to give a public infeftment — Sinclair relieving Lord Glenorchy of certain ward, relief, and non-entry duties.) " And, in like manner,
" paying yearly for the teinds of the said lands of Substers-
" wick, *alias* Subbuster, and pertinents thereof, to the minister
" serving the cure at the parish of Wick, present and to come,

" of the sum of twenty nine pounds, two shillings, and eight " pennies Scots of money, and two bolls victual, and for the " teinds of the said lands of Wedderclet and Hauster, of eight " pounds, six shillings, eight pennies of money, and two bolls of " victual, to the said minister of the parish of Wick, present and " to come, and relieving the said John Lord Glenorchy and his " foresaids, at their hands thereof yearly, as the proportional " part of the stipend now agreed upon to be paid yearly to the " said minister and his successors, for the teinds of the said haill " lands hereby disponed, in all time coming, and that in part " payment to the said minister of the stipend payable by the " said John Lord Glenorchy to him and his successors out of his " lordship's interest in the said parish *pro tanto*, beginning the " first term's payment of the said money-stipend at the feast and " term of Martinmas next, 1715 years, for that year's crop, and " of the victual-stipend for the said crop betwixt Yuill and " Candlemas thereafter, and so forth yearly and termly there- " after, in all time coming, and these for all other duty, customs, " secular services, exaction, or demands, that can be anyways " asked or craved of and from the said Francis Sinclair, or his " foresaids, out of the said lands and teinds, any manner of way " in time coming."

Here followed a procuratory of resignation, which repeated the above clause in regard to the payment to the minister of Wick, " which infeftments shall bear and contain the express " clause of warrandice following, likeas now, as if the same were " already past and expede, and then as now, the said John Lord " Glenorchy, by thir presents, binds and obliges him, his heirs, " and successors, to warrant, acquit, and defend this present " right and disposition, charters, resignations, and infeftments to " follow thereupon, and haill lands and others above disponed, " with the pertinents, together with the teind sheaves and par- " sonage teind of the same haill lands, to be good, valid, and

" sufficient, free, safe, and sure to the said Francis Sinclair, and " his foresaids, heritably and irredeemably, as said is, from all " and sundry wards, reliefs, non-entries, marriages, single and " double avails thereof, escheats, liferents, forfeitures, conjunct " fees, ladies' terces, wadsets, annualrents, former alienations, " private and public infeftments, interdictions, inhibitions, " apprisings, adjudications, recognitions, disclamations, pur- " prestures, reductions of infeftments, services, retours, impro- " bations, tacks, assedations, nullities, and from all taxed ward, " marriage, fee, and non-entry duties, which may hereafter " burden and affect such of the lands and others above men- " tioned as the said John Lord Glenorchy holds taxed, ward, " or fee, (except the proportion of the taxed ward and blench- " duties, which the said Francis Sinclair is burdened with by this " present right,) and to warrant, free, and relieve the said " Francis Sinclair, and his foresaids, of and from all future " augmentations of ministers' stipends, and burden upon the " teinds of the said haill lands, whether by augmentation, new " erection of parishes, or additional stipends, and that as well of " all years and terms bygone as in all time coming, and from all " other perils, incumbrances, burdens, dangers, and grounds of " eviction whatsomever, as well not named as named, bygone, " present, or to come, which may anyways stop, hinder, or " impede the said Francis Sinclair, or his foresaids, in the " peaceable possession, bruiking and enjoying of the said haill " lands and pertinents thereof above disponed, and teinds of the " same, and intromissions with, uplifting and receiving of the " mails, rents, profits, and duties thereof, in all time coming, at " all hands, and against all deadly, and but any hurt, prejudice, " or derogation, to the absolute warrandice contained in the " wadset right above narrated. Excepting always furth and " from the said warrandice both of lands and teinds, such " incumbrances (if any be) proceeding, or that hereafter may

" proceed, upon the facts and deeds of the saids deceased Francis " and Patrick Sinclairs, or of the deceased John Sinclair, late of " Stircock, father to the said Francis Sinclair, now of Stircock, " and of the said Francis Sinclair himself, since the granting of " the said wadset right above specified, and in time coming; " excepting also from the said warrandice the foresaid contract " of wadset, granted by the said John, Earl of Breadalbane, " (therein designed John Campbell of Glenorchy,) to the said " deceased Francis Sinclair of Stircock, of the lands, teinds, and " others above disponed, and infeftments following upon the " same, in so far allenarly as the same may import or infer " double warrandice against the said Earl, or the said John " Lord Glenorchy, his son, or their foresaids: But prejudice, " nevertheless, of the real right of wadset and infeftment follow- " ing thereon, to stand and remain in full force, as a farther " security to the said Francis Sinclair and his foresaids of the " lands, teinds, and others therein contained, excepting as is " above excepted: And the said Francis Sinclair binds and " obliges him and his foresaids, by their acceptation hereof, to " free, relieve, and disburden the said John Lord Glenorchy and " his foresaids, not only of the cess, taxations, ministers' and " schoolmasters' stipends, and other public burdens, imposed " upon the said lands and teinds above disponed, and due and " payable by them by the foresaid wadset right of all years and " terms bygone, since the time of their entry to the possession " of the said lands and teinds by virtue of the foresaid wadset " right; but also of all cess, taxation, horse and foot levies, " schoolmasters' stipends, and other public burdens and imposi- " tions whatsomever, imposed or to be imposed upon the said " lands in all time coming, and in like manner of the propor- " tions of stipend money and victual above specified, now con- " ditioned and agreed upon to be paid by him and his foresaids, " by this present right, to the minister serving the cure at the

" said parish kirk of Wick and his successors, also at and from " the term of Martinmas next to come, and yearly thereafter, " and for ever in all time coming, at the terms and in manner " above mentioned." (*Here followed a discharge of the money payable under the wadset.*) " Providing always, as it is hereby " expressly provided and declared, that the foresaid discharge " shall be without hurt, prejudice, or derogation to the absolute " warrandice contained in the said wadset right, and of the " wadset right itself, in as far as it may operate to a farther " security upon the lands, teinds, and others hereby disponed " in manner before mentioned. And, farther, the said John " Lord Glenorchy has made, constituted, and ordained, and " hereby makes, constitutes, and ordains the said Francis " Sinclair and his foresaids, his cessioners and assignees, in and " to the haill mails, farms, kains, customs, and casualties, " services, profits, and duties of the saids haill lands, teinds, and " others above disponed, and pertinents of the same, and that of " and for the crop and year of God seventeen hundred and " years, and haill terms thereof, and of all years and " terms thereafter, and in time coming, and to all action, " instance, pursuit, and execution whatsomever, competent to " them thereanent; and for the said Francis Sinclair and his " foresaids their farther and better security on the lands, teinds, " and others above disponed, and pertinents of the same, the " said John Lord Glenorchy assigns, transfers, and dispones, to " and in favours of the said Francis Sinclair and his foresaids, " all and sundry services, retours, precepts, and instruments of " sasine following thereupon, dispositions, contracts, charters, " apprisings, adjudications, and grounds and warrants thereof, " procuratories and instruments of resignation, precepts and " instruments of sasine, and other writs, evidents, rights, titles, " and securities whatsomever, made and granted by whatsomever " person or persons, to and in favour of the said John Lord

" Glenorchy and his predecessors, cedents, and authors, or led, " deduced, and obtained, at their, or either of their instances, " of, upon, or concerning the lands, teinds, and others above " disponed, with their pertinents, haill heads, articles, and " clauses of the saids writs and securities, with all that has fol- " lowed, or may follow thereupon, in so far as may be extended " in manner underwritten, and also all and sundry tacks, " assedations, decreets of platt and prorogation, assignations, " translations, dispositions, valuations, and other rights of and " concerning the teind sheaves and parsonage teinds of the haill " lands, and others above disponed, either already made, past, " and granted, of and concerning the same, in favours of the said " John Lord Glenorchy, or his predecessors, cedents, and " authors, or which they shall hereafter acquire, with the burden " always of the foresaid proportion of stipend money and " victual payable to the minister serving the cure at the said " parish of Wick, present and to come; and specially but preju- " dice of the generality foresaid, in and to the rights, and " dispositions made and granted to the said John, Earl of " Breadalbane, (therein designed John Campbell of Glenorchy,) " and to his heirs and assignees, by the deceased George, Earl " of Caithness, of the lands and earldom of Caithness and " baronies therein, with the infeftments and others following " thereupon: And in like manner, in and to the foresaid right " and disposition, made and granted by the said John, Earl of " Breadalbane to the said John Lord Glenorchy, of the saids " lands and earldom of Caithness, comprehending therein the " particular lands, lordships, and baronies therein expressed, " and in and to the procuratorie of resignation therein contained, " with the instrument of resignation following, or competent to " follow thereupon, and all these writs, generally and particularly " above mentioned and assigned, in so far allenarly as concerns " or may be extended to the said Francis Sinclair and his fore-

" saids, their security on the said lands, teinds, and others " hereby conveyed, and haill parts, pendicles, privileges, and " universal pertinents thereof, in manner hereby disponed, and " no farther; the maills and duties the said John Lord Glenorchy " binds and obliges him and his foresaids to warrant to be good " and sufficient to the said Francis Sinclair and his foresaids, " from his own proper fact and deed, allenarly done, or to be " done, in prejudice hereof; and the foresaid assignation to the " writs and evidents, in so far as may be extended to the " said Francis Sinclair and his foresaids, their security on the " saids lands, teinds, and others hereby disponed, at all hands, " and against all deadly: And because the writs of the lands, " teinds, and others above mentioned, contain diverse other " lands and teinds of far greater value than what are hereby dis- " poned, whereby the writs and evidents thereof cannot be " delivered: Therefore the said John Lord Glenorchy binds " and obliges him and his foresaids, to exhibit and produce the " same writs, conform to an inventory thereof, to be subscribed " by both parties before any judge competent, to be transumed, " the charges and expenses of the transumpts to be as follows, " viz. — the one-half thereof to be on the charges and expenses " of the said John Lord Glenorchy, and the other equal half on " the charges and expenses of the said Francis Sinclair and his " foresaids, and to make the principal writs themselves furth- " coming to the said Francis Sinclair and his foresaids, when " they shall have necessarily to do therewith: And lastly, both " parties do hereby declare and acknowledge that a minute of " agreement, dated the 16th day of June, 1706 years, passed " betwixt the said John Lord Glenorchy, and the said Francis " Sinclair, now of Stircock, anent the disponing to him the said " reversion, is fulfilled and performed by them to one another " in the haill heads, articles, and obligements thereof, *hinc inde*, " by extending this contract thereupon, and by payment of the

" sum thereby agreed upon for the said reversion, and by such " other writs as are now granted by them to one another there- " anent, without any innovation or alteration, except in so far " as the same is hereby, and by these other writs of consent of " both parties, altered and innovate, and therefore do hereby " mutually discharge one another and their heirs of the same:"

These deeds embraced the whole three parcels of land; but at this point the title to Sybster-Wick became distinct from that to Wedderclett and Hausters. The title to Wedderclett and Hausters being subject to the observation that, as will appear in the subsequent statement of the title to these lands, Francis Sinclair had conveyed away the lands prior to the date of this contract of 1715. The separate titles then stood thus:

First as to Sybster-Wick. On the 5th of February 1717, Francis Sinclair disponed to John Sinclair of Barrock, " and the " heirs-male procreat, or to be procreat of his body, which " failzieing, to his other nearest heirs and assigneys whatsomever, " All and haill the town and lands of Sybster-Wick," (described as in the contract of 1715;) " together w^{t} the haill parsonage- " teinds, and teind-sheaves of the saids haill lands, with the " pertinents; together also w^{t} all right, title, interest, claim of " right, property, and possession, as well petitor as possessor, " which I, my predecessors, cedents, or authors, had, have, or " any ways may have claim or pretend to the saids lands, or any " part thereof, or teinds of the same, in all time coming. In " the w^{ch} lands, teinds, and others above disponed, I bind and " oblige me, my heirs and succ'ors, to infeft and seise the said " John Sinclair, and his foresaids, heritably and irredeemably, " as said is, to be holden from me and them of the King's " Majesty, as immediate lawful superior of the same, sicklike, " and as freely in all respects, as I, or any of my predecessors " or authors, held, hold, or any way might have holden the " same ourselves, paying therefor yearly, and freeing and re-

" lieving me." [Here followed a clause of relief in regard to the ward-relief and non-entry's duties, and the payment to the minister of Wick, in the verbatim terms of the contract of 1715.] " And I bind and oblige me, my heirs and successors, " to make, grant, and subscribe, and deliver to the said John " Sinclair, and his foresaids, all writs and securities requisite and " necessar, containing pror'ies of resigna°n, and all other clauses " needful, w^t^ warrandice, in manner under-written." Then followed a procuratory of resignation, embodying the clauses of relief, and a clause of warrandice, which continued thus:—" As " also, to warrand, free, and relieve the said John Sinclair and " his foresaids, of and from all future augmentations of ministers' " stipends, and other burdens on the teinds of the saids lands, " whether by augmentation or new erection of parishes, or addi- " tional stipends in all time coming, (except the proportion of " victuall and money-stipend before-mentioned, hereby agreed " upon to be payed to the minister of Wick, and his successors " in all time coming, after his entry foresaid.")

There then followed an assignation to writs and evidents in these terms: — " And for the said John Sinclair and his fore- " saids their farder and better security of the lands, teinds, and " others above disponed, and pertinents of the same, I, by these " presents, assign, transfer, and dispone, to and in favours of " him and his foresaids, all and sundry services, retours, precepts, " and instruments of sasine following thereupon, dispositions, " contracts, charters, apprisings, adjudications, and grounds and " warrants thereof, procuratories and instruments of resignation, " precepts and instruments of sasine, and all other rights, evi- " dents, writs, titles and securities whatsoever, made and granted " by whatever person or persons, to and in favours of me and " my foresaids, or led and deduced at any of their instances, of " and concerning the said lands, teinds, and others above dis- " poned, with their pertinents, haill heads, articles, clauses,

" obligements of the said writs and securities, with all that has " followed, or may follow upon all or any of them, in so far as " may be extended in manner underwritten. And also, all tacks " and assedations, decrees of platt and prorogation, assignations, " dispositions, valuations, and other rights, of and concerning " the teind-sheaves and parsonage-teinds of the said lands and " others above disponed, either already made, past, and granted, " of and concerning the samen, in favours of me, my authors and " predecessors, or which they or I shall hereafter acquire, with " the burden always of the foresaid proportion of stipend before " mentioned, both money and victual, payable to the minister " serving the cure of the said parish of Wick, and to his suc- " cessors. And specially, but prejudice of the generality " foresaid, in and to the rights and dispositions made and " granted by the deceased George Earl of Caithness, in favours " of John Earl of Breadalbane, (therein designed John Camp- " bell of Glenorchie,) of the lands and earldom of Caith- " ness: As also, in and to the rights and conveyances " made and granted to the said John Earl of Breadalbane, " (therein designed as said is,) and to his heirs and assignees, by " the deceased Sir Robert Sinclair of Longformacus, Knight; of " Mr John Bayne of Pitcarlies, apprisings and other rights upon " the estate of Caithness, whereof the lands, teinds, and others " hereby disponed, are proper parts and pertinents; and to the " saids apprisings and other rights themselves, grounds and war- " rants of the same, as also the haill other apprisings, adjudica- " tions, infeftments, and all other rights of, upon, and concerning " the saids earldom and estate of Caithness, in the person of the " said Sir Robert Sinclair and several other persons, his cedents " and authors, from whom he had right, all particularly men- " tioned and set down in two several rights and dispositions " made and granted by the said Sir Robert Sinclair to the said " Earl of Breadalbane, (therein designed as said is,) and to his

" heirs and assignees therein mentioned, both dated the
" days of and registered: And, in like manner, in
" and to the right and disposition made and granted by the said
" John Earl of Breadalbane to John Lord Glenorchie, his son, of
" the saids lands and earldom of Caithness, comprehending the
" lands, lordships, and baronies therein expressed, and particu-
" larly the lands and teinds above disponed, and in and to the
" procuratory of resignation therein contained, with the instru-
" ment of resignation following, or competent to follow upon the
" samen, dated the days of and registered;
" as also, in and to the contract of wadset, passed betwixt the
" said John Earl of Breadalbane, (therein designed as aforesaid,)
" and the deceased Francis Sinclair of Stirkoke, my grandfather,
" whereby the lands, teinds, and others above disponed, were,
" with several other lands, wadset to my said grandfather, for
" the sums therein contained, bearing date the 28th day of
" December, 1675, with the haill obligements, clause of warran-
" dice, and others therein contained, infeftments following there-
" upon, and conveyances in my favours of the same. As also in
" and to a contract of vendition passed betwixt the said John
" Lord Glenorchie and me, bearing date the 28th day of March,
" and 20th day of April, 1715 years, and registered in the General
" Register of Sasines, Reversions, and Renunciations kept at
" Edinburgh, upon the 25th day of May thereafter; whereby
" the said John Lord Glenorchie not only discharges the rever-
" sions competent to him of the lands and teinds hereby disponed,
" with several others, but also of new dispones the same in my
" favours: And in and to the procuratory of resignation, clause
" of absolute warrandice, obligement for transuming the writs
" relating to the saids lands, and haill other clauses and oblige-
" ments therein contained, conceived in my favours, with all that
" has followed, or may follow thereupon."

" And all these writs, particularly and generally above assigned,

" allenarly, in so far as may concern or be extended to the said " John Sinclair and his foresaids their security of the lands, " teinds, and others hereby conveyed, and haill parts, pendicles, " privileges, and universal pertinents thereof, hereby disponed, " and no farder: which assignation to the maills and duties I " bind and oblige me and my foresaids to be good, valid, and " sufficient to the said John Sinclair and his foresaids, from my " own proper fact and deed allenarly, done or to be done by me " in prejudice hereof: and the foresaid assignation to the rights " and evidents, so far as may be extended for a security to the " said John Sinclair and his foresaids, of the lands, teinds, and " others hereby disponed, at all hands, and against all deadly, as " law will: And I bind and oblige me, my heirs and successors, " to make such of the writs and evidents, generally and particu- " larly above assigned and transferred, as shall be in my custody " and possession, or transumpts thereof, or extracts of the same, " furthcoming to the said John Sinclair and his foresaids, when- " ever he or they shall have necessarily to do therewith, upon " their receipt and obligement to deliver the same back to me, " because they contain several other lands, and so cannot be given " up to him, or shall cause register such principal writs as I have, " or produce the same before any judge competent to be tran- " sumed, if the said John Sinclair shall think fit. The one-half " of the expenses thereof to be paid by me, and the other half by " the said John Sinclair."

John Sinclair of Barrock was succeeded in the lands and teinds of Sybsterwick by his son, Alexander Sinclair of Barrock, who, on 30th August 1744, was served nearest and lawful heir in general to him.

Alexander Sinclair, by disposition bearing date the 22d August 1769, *(the date in all the papers,)* disponed the lands of Sybsterwick to his brother, John Sinclair, who again, by disposition bearing date 17th September 1767, *(the date in all the papers,)* disponed them to Thomas Dunbar of Westfield.

In 1796, under a ranking and sale brought by the creditors of Dunbar, the lands and teinds of Sybsterwick were judicially sold to David Brodie, who, on the 22d of July, 1797, expede a charter of confirmation and sale, on which infeftment followed on 17th August thereafter.

By the decree of sale it was declared, that the "said David "Brodie and his foresaids have right to the haill writs and evi- "dents, title-deeds and securities, both old and new, of and "concerning the lands and others foresaid, purchased by him; "haill heads, clauses, tenor, and contents thereof, with all that "has followed, or is competent to follow thereupon."

On the 5th September, 1818, David Brodie conveyed the lands and teinds to trustees, with a power of sale, and assigned them "in and to the whole writs and evidents, rights, titles, and "securities of said lands and others, and tenements, made and "granted in favour of me, my predecessors and authors, and "whole clauses therein contained, with all that has followed or "may be competent to follow thereupon for ever, surrogating "and substituting them in my full right of the premises for "ever."

The trustees, by a contract of sale, of date the 21st and 23d January, 1823, and disposition following thereon of date 13th March, 1824, conveyed the lands and teinds to William Horne, the respondent, and on this disposition he was infeft on the 14th day of March, 1824.

By this contract of sale, and disposition, Horne was assigned "in and to the whole writs and evidents, rights, titles, and secu- "rities of the said lands and teinds and others, made to and in "favour of the acquirers and their authors and predecessors, and "whole clauses therein contained, with all that had followed, or "might be competent to follow thereon."

Second, in regard to the lands of Wedderclett and Hausters.

On the 18th May, 1710, Francis Sinclair, while infeft under

the wadset of 1675, and having a personal right to the reversion under the minute of agreement of 1706, for its purchase, and before the contract of sale of 1715 had been executed, disponed Wedderclett and Hausters to his brother, George Sinclair, under the burden of his own liferent, and of his debts and family provisions, by a disposition containing the following assignation:—

"And in like manner, with and under the said burdens, re-
"strictions, and reservations, I hereby assign and transfer the
"haill writs, evidents, rights, and securities, both original and
"by progress, legal and conventional, made, granted, conceived,
"or that any ways may be interpreted in favour of me, my
"authors, and predecessors, of and concerning the lands, mills,
"teinds, and others above disponed, clauses of warrandice, and
"haill other clauses, import and contents of all the said writs
"and evidents, with all that has, or is competent to follow
"thereupon."

Francis Sinclair died in 1723, leaving his estate burdened with debts and family provisions. In 1734, John Sinclair of Barrock, who was his creditor, raised and executed a summons of adjudication against George Sinclair, the brother and heir of Francis, which, on George's death, was prosecuted against Charles, the son and heir of George. On this summons John of Barrock obtained decree, as did several other creditors, in actions raised by them. In 1741, the creditors raised a process of ranking and sale in the name of John Sinclair of Barrock, which, on his death in 1743, was prosecuted by his son, Alexander Sinclair of Barrock.

On the 22d June, 1750, Alexander Sinclair expede a charter of resignation on an instrument of resignation, which set forth, that, "in virtue of, and conform to, a procuratory of resignation
"contained in a contract of sale of the lands of Sybsterwick,
"*alias* Subuster, Wedderclett, and Upper and Nether Hausters
"or Hasbusters, with the teinds thereof and pertinents after

" mentioned, between the said John Earl of Breadalbane, therein " designed Lord Glenorchy, and the deceased Francis Sinclair " of Stirkoke; whereby the said Earl sold and disponed the said " lands and teinds to the said Francis Sinclair, and to his heirs " and assignees; which contract bears date the 28th day of March, " and 20th day of April, in the year 1715, and is registered " in the books of Session the 1st day of June, 1727; which pro- " curatory of resignation, in so far as concerns the said lands of " Sybsterwick, was assigned and conveyed by the said Francis " Sinclair to the deceased John Sinclair of Barrock, by disposi- " tion dated the 15th day of February, in the year 1717, and " registered in the books of Session the 22d day of January, 1728; " and to which procuratory of resignation, Alexander Sinclair, " now of Barrock, has right as heir in general, served and re- " toured, to the said John Sinclair, his father, conform to his " service before the Baillies of the Canongate, dated the 30th " day of August, 1744, duly retoured to the Chancery; and " which procuratory of resignation, in so far as concerns the said " lands of Wedderclett, Upper and Nether Hausters or Has- " busters, was disponed by the said Francis Sinclair to George " Sinclair of Stirkoke, his brother, conform to a disposition dated " the 18th day of May, 1710; and was, with the said lands them- " selves, adjudged at the instance of the said Alexander Sinclair " of Barrock from Charles Sinclair, eldest son and apparent heir " of the said deceased George Sinclair, as lawfully charged to " enter heir to him, but who renounced, conform to a decree of " adjudication obtained before the Lords of Council and Session, " at the instance of the said Alexander Sinclair against the said " Charles Sinclair, dated the 11th day of July, in the year 1749." Alexander was infeft upon this charter on 4th October, 1750.

On 11th March, 1786, Wedderclett and Hausters were judicially sold to Alexander Sinclair. The decree of sale declared " That the said Alexander Sinclair of Barrock shall be freed and

" relieved of all feu-duties, ministers' stipends, schoolmasters' " salaries, and other duties and burdens whatsoever, payable out " of the said lands, at and preceding said term of Whitsunday " 1786 years, and of the cess or land-tax for said haill lands, " payable at and preceding the 25th day of March said year: " And further, that the said purchaser's entry to the said lands " shall be at the term of Whitsunday next, and that he is to " have right to the rents, maills, and duties payable to the " common debtor, or his creditors, from and after the said " term, being for crop and year 1786, and in all time coming. " And found and declared that the said Alexander Sinclair, the " purchaser of the said two lots of the before-mentioned lands, is " to take the rentals thereof, and deductions therefrom, as they " are stated in the prepared state of the process, abstract thereof, " and the act of roup; and that any other parochial assessments, " augmentations of ministers' stipends, and other annual burdens, " after Whitsunday 1786, are hereby understood and declared " to be at the risque and hazard of the said purchaser; and " that he shall not be entitled to any deduction from the respec- " tive prices offered by him, on account of any fall or decrease " of rent, since the judicial rental was taken, or for any other " cause or pretext whatever."

Alexander Sinclair thereafter obtained a charter of sale and infeftment in the lands.

On the 8th May, 1787, Alexander Sinclair conveyed the lands and teinds of Wedderclett and Hausters to trustees, by a disposition which contained the following clause: — " And moreover, " I do hereby assign, dispone, and make over to my said trustees, " or a quorum of them surviving and acting, or to the survivor, " for the uses and purposes foresaid, not only all and sundry " contracts, dispositions, charters, infeftments, procuratories and " instruments of resignation, precepts and instruments of sasine, " services, retours, and infeftments following thereon, wadset

" rights, reversions, renunciations, apprisings, adjudications, tacks " and rights of teinds, decreets of platt, prorogation, valuation, " and sale, assignations, translations, dispositions, and other con- " veyances thereof, and all other writs, rights, evidents, titles, " and securities whatsoever, made, granted, and conceived, or " which may be anyways interpreted in favours of me, my pre- " decessors and authors, of and concerning the lands, mills, " teinds, fishings, and others, particularly and generally above " disponed, with the whole clauses of warrandice, and other " clauses, tenor, and contents thereof, and all that has followed, " or may follow upon the same."

By disposition bearing date 31st December, 1803, and 4th January, 1804, the trustees of Alexander conveyed the lands and teinds of Wedderclett and the Hausters, to John Horne, the father of the respondent, the disposition containing an assignation to the whole " writs and evidents, rights, titles, and securities of " the said lands, teinds, and others, made and granted in favour " of the said Alexander Sinclair, his predecessors and authors, " and whole clauses of warrandice, and other clauses therein " contained, with all that has followed, or may be competent to " follow thereon for ever."

John Horne was infeft on this disposition, and on the 7th January, 1823, he disponed the lands and teinds to the respondent, by a deed containing this clause :—" And further, I hereby " make and constitute the said William Horne and his foresaids " my cessioners and assignees, in and to the whole writs, titles, " and securities of the said lands and others, made and granted " in favour of me or my predecessors and authors, and whole " clauses therein contained, with all that has followed, or may be " competent to follow thereon for ever."

On this disposition the respondent was infeft on the 8th April, 1823.

In March, 1828, the respondent brought an action against the

Marquis of Breadalbane, the representative of the party to the contract of sale of 1715, and Sir John Sinclair of Ulbster, as representing John Sinclair of Ulbster, and also against the trustees of Sir John, by a summons which set forth the contract of 1715, and the titles which have been detailed; and further, that in the year 1719, Lord Glenorchy conveyed to John Sinclair of Ulbster, the lands and teinds of Sybster, Wedderclett, and Hauster, which had been previously conveyed, as above narrated, to Francis Sinclair of Stirkoke; but "with and under the burden "of all bargains and sales made by our said umq^{l}. father (the "Earl of Breadalbane) or us, of any part or portion of the "lands, teinds, or others particularly and generally above dis- "poned, or tacks of any of the said teinds, or oblidgements "therein contained, before the said 7th day of January, 1719 "years; which the said John Sinclair, by his acceptation hereof, "binds and obliges him, his heirs and successors whatsomever, "to ratify, approve, and implement in the haill heads, tenor, "and contents thereof, in so far as we or our said umq^{l}. father "are bound thereby, or never to quarrel or impugn the same, "upon any account whatsomever, that will afford ground of "eviction, or recourse against us or our foresaids." The summons then set forth, that under this disposition, John Sinclair, and his successors or representatives, were substituted in the room of Lord Glenorchy, and his successors and representatives, in all the obligations undertaken by his Lordship, with relation to the lands, teinds, and others, anterior to the date of the said disposition in favour of John Sinclair of Ulbster; and that in particular, he and his foresaids were substituted in the room of Lord Glenorchy and his foresaids, in all the obligations of warrandice and otherwise contained in the contract of sale of 1715. THAT since the date of that contract, sundry augmentations of the stipend payable to the minister of the parish of Wick had been made; that in particular, in 1719, an augmentation to a

small extent took place, that a second augmentation was obtained in 1793, a third in 1807, and a fourth in 1823; and that, in consequence, the teinds of the respondent's lands of Sybsterwick, Wedderclett, and Hauster, had been subjected to exactions far exceeding the amount stipulated by the contract of 1715, and that the respondent and his authors had been under the necessity of paying the demands made upon them under decrees of modification, no locality of the minister's stipend having hitherto been made up, and latterly, (since 1825,) under an interim-scheme of locality.

The conclusions of the summons were, that it should be found that the Earl of Breadalbane, as representing the deceased John Earl of Breadalbane, and Lord Glenorchy; and Sir John Sinclair, as representing John Sinclair of Ulbster; and the trustees of Sir John Sinclair, or one or more of these parties, were bound and obliged "in terms of the conditions and provisions of the foresaid "contract of sale betwixt John Lord Glenorchy and Francis "Sinclair of Stirkoke, and of the said disposition in 1719, "granted by the said John Lord Glenorchy in favour of John "Sinclair of Ulbster, to free and relieve the pursuer, and his "said lands and teinds of Sybster, of all payments of stipend "beyond the said stipulated amounts of £29 : 2 : 8 Scots money, "and two bolls of victual, and the pursuer and his said lands "and teinds of Wedderclett and Hauster, of all payments of "stipend beyond the said stipulated sums of £8 : 6 : 8 Scots "money, and two bolls of victual in all time coming: And the "said defenders, or one or more of them, ought and should be "decerned and ordained to repay to the pursuer, as heritable "proprietor of the said lands and teinds, the whole sums of "money or quantities of victual which he or his authors have "advanced or paid to the said minister of the parish of Wick, "or that he may hereafter advance and pay towards the discharge "of the said four several augmentations of stipend, beyond the

" said stipulated amounts of £29 : 2 : 8 Scots money, and two " bolls of victual for his said lands and teinds of Sybster, and of " £8 : 6 : 8 Scots money, and two bolls of victual, for his said " lands and teinds of Wedderclett and Hauster, as the said pay- " ments may be instructed, fixed, and ascertained in the course " of the process to follow hereupon, or otherways; with the " lawful interest of these sums since the dates of the same were " respectively paid, and in time coming till repayment."

Lord Breadalbane pleaded in defence, that he did not represent either the Earl of Breadalbane party to the contract of 1715, nor his son Lord Glenorchy. Sir John Sinclair and his trustees pleaded, That the respondent had no title to found on, or make any claim under the deed of 1719. And both sets of defenders pleaded, That the warrandice granted to Francis Sinclair, had not been transmitted to, and did not subsist in the respondent, and that even if the respondent were in right of the warrandice, it was cut off by the negative prescription.

The record having been closed upon condescendences and answers, the Lord Ordinary, on the 12th of November, 1833, pronounced the following interlocutor:—"The Lord Ordinary having " heard parties' procurators, and thereafter considered the closed " record and whole process; sustains the title of the pursuer: Finds " that the defender, the Marquis of Breadalbane, is bound to relieve " the pursuer, and his lands and teinds of Sybster, as libelled, of " all payments of stipend beyond the amounts of L.29 : 2 : 8 " Scots money, and two bolls of victual; and also to relieve the " pursuer, and his lands and teinds of Wedderclett and " Hauster, as libelled, of all payment of stipend beyond the " amounts of L.8 : 6 : 8 Scots money, and two bolls of victual, in " all time coming; but this with exception of those portions of " the stipend which are payable by the pursuer for his said lands " or teinds under any augmentation of stipend, granted forty " years before the pursuer insisted on the present claim of re-

" lief; and in respect of the pursuer's claim for relief or repay-
" ment of arrears of stipend for years bypast, and in respect of
" the liability of the defender, Sir John Sinclair, appoints the
" parties to be farther heard."

The defenders reclaimed against this interlocutor, and the respondent took the same course so far as regarded the exception contained in it. Upon the reclaiming notes for the parties being advised, the Court appointed them to state their argument in mutual cases.

Upon considering the revised cases for the parties, the Court on the 20th February, 1834, pronounced the following interlocutor: — " The Lords having advised the cause, and heard
" counsel for the parties; adhere to the interlocutor of the Lord
" Ordinary submitted to review, in so far as to find that the ob-
" ligation of warrandice in the contract of 1715, libelled upon, is
" effectual to relieve from all future augmentations of stipend;
" and that it has been duly transmitted to the pursuer: There-
" fore, and to this effect, sustain the pursuer's title, and decern;
" but before farther answer, ordain the printed papers in the
" cause to be laid before the Judges of the First Division, and
" permanent Lords Ordinary, for their opinion, whether, and to
" what extent, the plea of negative prescription is applicable to,
" and can be maintained in defence of the present action."

Before the opinion of the Judges had been obtained, the Marquis of Breadalbane died; and the appellants, as his accepting and surviving trustees, were sisted as defenders in his room. Subsequently the following opinion was given by the consulted Judges.

" In 1715, by a contract of sale, Lord Glenorchy sold to
" Francis Sinclair certain lands, with the teinds, and this con-
" tract contains a clause of warrandice, the first part of which is
" of a more general nature; but the latter part is in these
" words: — ' And to warrant, free, and relieve the said Francis
" ' Sinclair and his foresaids, of and from all augmentations of

" ' ministers' stipends, and burdens upon the teinds of the said " ' haill lands, whether by augmentations, new erections of " ' parishes, and additional stipends, and that as well of all " ' terms and years bygone as in all time coming, and from all " ' other perils, dangers, encumbrances, and grounds of eviction " ' whatsoever, as well not named as named, bygone, present or " ' to come, which may anyways stop, hinder, or impede the " ' said Francis Sinclair, or his foresaids, in the peaceable pos- " ' session, bruiking and enjoying of the said haill lands and " ' pertinents thereof above disponed, and teinds of the same, " ' and intromissions with and recovering of the rents, maills, " ' profits, and duties thereof, in all time coming, at all hands, " ' and against all deadly,' under the special exception of the " ' proportions of stipend money and victual above specified, " ' now conditioned and agreed upon to be paid by him, the " ' said Francis Sinclair, and his foresaids, by this present right, " ' to the minister serving the cure at the said parish kirk, and " ' his successors, at the terms, and in the manner above men- " ' tioned.' This contract is dated the 28th March, and 20th " April, 1715. The right to the subjects and warrandice con- " veyed by this contract, has passed through various authors " into the pursuer, Mr Horne, who now pursues the Marquis " of Breadalbane, and Sir John Sinclair, as representatives of " Lord Glenorchy, for relief, in reference to time both past and " future, from certain augmentations of stipend obtained by the " minister of the parish of Wick, within which the lands lie. " These appear to have been obtained at different dates, parti- " cularly in 1719, 1793, 1807, and 1823. It does not appear " that any locality of these augmentations has ever been approved " of; but the augmented stipend has been paid under interim " localities, and in this way a portion of stipend in each augmen- " tation has been paid out of the lands conveyed to Mr Sinclair " by Lord Glenorchy. No action upon the obligation of war- " randice and relief of stipend appears ever to have been

" brought, in consequence of any of these evictions, until the " present summons was raised in 1828. In defence against this " action, various pleas have been stated, but the only one in " reference to which the opinion of the First Division and Lords " Ordinary is now required, is that of the negative prescription, " the question being ' whether, and to what extent the plea of " ' the negative prescription is applicable to, and can be main- " ' tained in defence of the present action.'

" It appears to us, that the law applicable to this question is " to be found in the statute 1617, c. 12, which, after enacting " the positive prescription, provides, — ' And sicklike his " ' Majesty, with advice foresaid, statutes and ordains, that all " ' actions competent of the law upon heritable bonds, rever- " ' sions, contracts, or others whatsoever, either already made, " ' or to be made after the date hereof, shall be pursued within " ' the space of fourty years after the date of the same, except " ' the saids reversions be incorporate within the body of the " ' infeftments used and produced by the possessour of the saids " ' lands, for his title of the same, or registered in the Clerk of " ' Register, his books, in the which case, seeing all suspicion " ' of falsehood ceases, most justly the actions upon the saids " ' reversions ingrossed and registrated, ought to be perpetual; " ' excepting always from this present act all actions of warran- " ' dice which shall not prescribe from the date of the bond or " ' infeftment whereupon the warrandice is sought, but only " ' from the date of distresse, which shall prescribe, it not being " ' pursued within forty years as said is.'

" Under this provision, we think that when any subject is " warranted, as soon as the whole or any part of it is evicted, " and consequently an action of warrandice or relief in reference " to that total or partial eviction arises, then the negative pre- " scription begins to run against that action from the date of the " eviction or distress. The consequence, we think, is, that if " the eviction be total, the whole warrandice may be lost in forty

" years from its date. If the eviction be partial, the warran-
" dice may be lost to that extent, but no farther. We do not
" think that the whole benefit of a clause of warrandice can be
" lost by negative prescription, because a small part of the sub-
" ject warranted has been evicted, and action for that partial
" eviction has not been raised within forty years. To apply this
" to the present case: Part of the subject disponed by Lord
" Glenorchy was certain teinds, exposed, among other risks, to
" the risk of eviction by the minister for augmentation of his
" stipend; and against this Lord Glenorchy granted an obliga-
" tion of warrandice and relief. When, after the date of this
" obligation, the minister obtained an augmentation, we think
" that the obligation of warrandice and relief instantly applied,
" and that an action of warrandice and relief immediately arose.
" For as soon as the augmentation was granted, it instantly
" affected the teinds, and the minister had immediate right to
" charge any teind-holder, as intromitter with the teinds, for the
" whole amount of his augmented stipend, leaving the heritors
" to their relief against each other. Each heritor's teinds, too,
" became properly and ultimately liable for a certain proportion
" of the augmentation. Though it might take some time before
" an interim locality was settled, and a very long time before a
" final locality was settled, yet the teinds of each heritor were
" not the less on that account truly liable to the burden of the
" augmented stipend in certain proportions from the date of the
" augmentation. It seems to us clear, therefore, that as soon as
" an augmentation was granted, an action arose for relief from
" the augmentation, in terms of the obligation of warrandice,
" and consequently the negative prescription began to run
" against that action, and against the obligation of warrandice
" and relief *pro tanto*.

" We do not think that Mr Sinclair, or his successors, were
" limited to a set of actions brought from year to year, for
" relief from annual payments of augmented stipend. We

" think they were fully entitled, immediately on the granting of " each augmentation, to have brought an action for relief from " that augmentation, out and out, in all time coming; and " therefore, we think that it is against such an action that the " negative prescription came to run. Indeed, the present action " contains a conclusion of that very kind for relief from the " augmentations in all time coming.

" Neither do we think that the running of the prescription " could be delayed by an interim locality. That might bar " action of relief by the heritors *inter se*, for extra payments of " stipend, but had nothing to do with the relief from the aug- " mentation due to one heritor, not by other heritors, but by his " authors, who sold him the teinds with warrandice from aug- " mentations, for which relief action became instantly competent, " and might competently conclude for relief from the interim " locality itself, as consequent on the augmentation, against " which the warrandice was granted.

" We are of opinion, therefore, that the negative prescription " against the obligation on which this action is founded, ran " from the date of each augmentation, and in reference to that " augmentation; and therefore, that the negative prescription " affords a defence to the extent of the augmentations granted " forty years before the pursuer raised the present action of " relief, as has been found by the Lord Ordinary.

" We have only to add, that we do not think that the whole " obligation of warrandice and relief from augmentations, could " be lost by the negative prescription running after the granting " of one or more augmentations, partially affecting the teinds, " more than the whole of the warrandice of any subject is lost " by one or more evictions of parts only of it, followed by " neglect to pursue for relief thereof during forty years. We " think that what prescribes under the statute 1617 is the right " of action for any distress or loss actually incurred by eviction; " and that the prescription cannot extend farther than the evic-

" tion. The contrary rule would expose the warrandice of " great estates to be lost by the most trifling evictions of incon- " siderable parts; and we see no authority for extending the " statute to so severe an effect."

An appeal and cross appeal were taken against the interlocutors which have been detailed, which came on for hearing on 7th May, 1840, when the following procedure took place at the bar, after the counsel had been heard at considerable length, and, as is believed, the reply had been opened.

Lord Chancellor. — It is impossible to decide the points of law in this case, on account of the facts not being properly ascertained. The Judges below state them as quite clear; but it appears as to two of these estates, that the matter is quite doubtful.

Mr Walker. — (For the respondent) proposed to explain.

Lord Chancellor. — With regard to the other two estates, have you any means, from the printed papers, of shewing the House how you connect the present pursuer with these?

Mr Pemberton. — No, my Lord.

Lord Chancellor. — Then it would be useless to occupy the House any farther, because the House is not in possession of sufficient information to affirm what the Court below has done. I feel that the House is not now in possession of the documents upon which it can come to that conclusion, and therefore, the only course the House can pursue, is, to send it back to the Court of Session for that purpose.

Sir William Follet. — I apprehend the whole case is now before the House. If the other side cannot satisfy the House by the printed documents now before it, I apprehend the House need not remit it back, but may at once dispose of it. I think, from the investigation we have made, that it will be impossible for my learned friends to make out their title.

Lord Chancellor. — This House has been in the habit, and I

think it a wholesome rule, when a material point in a case appears not to have received that consideration from the Court below which it ought to have received, to give the Court below the opportunity of reconsidering that opinion, the Court below of course being apprised of the importance which this House attaches to it. I cannot discover any thing from the printed papers in this case, with respect to that which was the foundation of the title, that has in fact received any consideration at all. If the respondent feels he cannot make any thing of it, of course he will not put the other parties to the expense of farther inquiring. But I think, from what I have heard from the counsel, that is not the case.

Mr Pemberton. — My Lord, we had not the slightest doubt about the title, and it was merely because it appeared to us so clear, that it has not been put forward in so plain a manner as it otherwise might have been.

Sir William Follet. — I do not apprehend that any farther can be stated.

Lord Chancellor. — How do you account for the opinion of two of the Judges, that the pursuer had entitled himself to the benefit of the covenant.

Sir William Follet. — They had exactly the same evidence before them, as the House now has before it.

Lord Advocate. — It is mis-recited in the statement. I was not aware, till we were in consultation last night, that the property had been so mis-recited in the papers.

Mr Walker. — There is an argument before the procuratory, that will be found in the case before the Court below; and at page 48 there is this general objection, — "Because, even if in "the contract of sale of 1715, Lord Glenorchy had undertaken "an obligation of relief to the extent claimed, that obligation "has not been transmitted to the respondents." Then follows a page of argument, but not a word in the argument upon the

deed of 1710, and the effect of the procuratory; and also in the appellant's case there is a short argument, but not a word as to the effect of the procuratory.

Sir William Follet. — It is distinctly stated, as I mentioned to your Lordships before, that "the lands of Wedderclett and "Hauster were disponed by Francis Sinclair to George Sin-"clair of Stirkoke, by a disposition dated 18th May, 1710, five "years before the date of the contract libelled on, and of course "before Francis Sinclair had any right to that contract, or the "obligations which it contains, whatever they might import."

Mr Walker. — No doubt, in 1710, it appears there had been a conveyance; but that objection would not go much farther than the objection which is now insisted upon. In 1710, Francis Sinclair, as your Lordships will recollect, had not the right of property in these lands of Wedderclett and Hauster, nor even of Sybster at that period, because they were not conveyed until 1715, by the deed which contains this obligation of warrandice. We shew afterwards, as to Sybster, that in 1717 the lands are specifically conveyed, and there is an express reference made to the deed of 1715, and the obligation of warrandice therein contained, and all rights of warrandice are specifically made over. As to Wedderclett and Hauster, I admit the case is somewhat different; and although the specific objection was not pleaded and made matter of argument in the Court below, it did appear to Lord Gillies in a manner, that he thought the case perfectly clear as to Sybster, and sufficiently clear as to Wedderclett and Hauster. Now the objection made as to this ——

Lord Chancellor. — If you prefer arguing the point, I should be glad that you should have an opportunity of stating the points as they exist, but I shall understand that as precluding you from the offer I made.

Sir William Follet. — It would be better that the parties

should print any other documents they may wish to add to their case.

Lord Chancellor. — The House is under this disadvantage, that we have here two learned Judges telling us they are quite clear upon a particular point, without any means of our knowing what were the grounds of their opinion upon that point. They do not appear either in the argument or in the judgment; we have not therefore the means of ascertaining how far the opinion was accurate, when we have not the grounds upon which the opinion has been given.

Sir William Follet. — We have so often the judgments of the Scotch Judges without giving any reasons for their opinions, that if it were to be sent back on that ground, it would be a reason for sending back many other cases.

Lord Chancellor. — My notion is, that we should ask for the grounds of the opinion, because we think it is not sufficiently clear what the grounds are. I think it is not doing justice between the parties, unless we have more information of the grounds of the opinion of the Court below, than sometimes we are in the habit of receiving. Here the costs will be a matter of future consideration, because if the respondent takes this to the Court below, and if the Court below finds he has no more case to make than appears from the printed papers, that may be set right hereafter; but I cannot think it safe to affirm the judgment of the Court below, without farther information. Whether the pursuer can make out his title, will be a question. But it would also be extremely hazardous to reverse the judgment of the Court below, and so decide upon the points, without more information as to the grounds upon which their opinions were given. It appears to me, that the only way of doing justice between the parties, will be to remit to the Court of Session upon this point, to consider how far the obligation of warrandice in the contract of 1715 has been duly transmitted to the pursuer, and

to state the reasons upon which they come to any conclusion upon the subject. That leaves the question of law, which is now sufficiently open for adjudication where it is, if the plaintiff shews himself in the situation of a party entitled, he will have the benefit of it. That, of course, cannot arise, unless he can shew himself to be in that situation; but at the present moment I do not think he is.

It was then "ordered and adjudged, that the case be remitted "back to the said Second Division of the Court of Session in "Scotland, to consider and state their opinion, how far the obli- "gation of warrandice, under the contract of 1715, mentioned "in the appeals, has been duly transmitted to the pursuer; and "this House does not think fit to pronounce any judgment upon "the said appeals, until the said Second Division of the Court "of Session shall have given their opinion upon the matter here- "by referred to their consideration, according to the direction of "this order."

When the cause went back to the Court of Session, cases were ordered upon the question contained in the remit, and at advising these papers on the 12th of January, 1841, the following opinions were delivered by the judges: —

The Lord Justice Clerk. — I have again considered the objections stated on the part of the Trustees of the late Marquis of Breadalbane, to the transmission of the obligation in the contract of sale of 1715, to the present pursuer, with the remit from the House of Lords, on which this Court is called upon to state their opinions, "How far the obligation of warrandice, "under the contract 1715, mentioned in the appeals, has been "duly transmitted to the pursuer;" and I must begin by stating, that we must confine our attention to the question thus remitted, as I consider we have at present nothing whatever to do with any question as to the application of the negative prescription, of

dereliction, or of the true nature and effect of the obligation of the warrandice itself, and various other arguments introduced into the cases, as all these matters have already been decided by the judgments under appeal, and remain, accordingly, *sub judice* in the House of Lords.

The two parcels of land to which the obligation of warrandice is applicable, stand, in some respects, in different situations, though they are both included in the contract of sale between Lord Glenorchy and Francis Sinclair, 25th March, and 20th April, 1715.

The contract referring to the previous right of wadset, which Sinclair had held of the lands of Subuster, as well as of Wedderclett and Hauster, from 1675, and to the wadset sum, with the additional price thereby acknowledged to be received after renouncing all right of redemption under the wadset, conveys the absolute and irredeemable property of the lands and their teinds to Sinclair, the purchaser; and, in consideration of the price then received, stipulating for the purchaser being liable in future for certain precise payments of teinds, in regard to both parcels of land, to the minister of Wick, as being the proportions of the stipends payable by Lord Glenorchy, for and in respect of all the lands that belong to him in that parish.

But, besides the clause of absolute warrandice, securing to the purchaser the right to the lands and teinds, which is conceived in the broadest terms, this contract farther contains an additional clause, warranting and securing the said Francis Sinclair and his heirs aforesaid, namely, "his heirs and successors whatsoever, "against all future augmentations of ministers' stipend," &c. It is impossible to read this, and other clauses in this contract, without being satisfied, that, while it distinctly defined the extent of the purchaser's future liability for the certain precise payments of teind therein specified, and which are repeatedly referred to, it clearly declared, that, in virtue of his purchase, the buyer, Fran-

cis Sinclair, and his successors whatsoever, were to be relieved, in all time coming, from the payment of any augmentations of stipend which might be granted.

That the exemption was meant to be available, not only to the purchaser himself, but to all his successors whatsoever, in the lands and teinds conveyed, seems to be perfectly manifest; and, accordingly, the seller assigns bodily the whole rights, titles, and securities whatever, that he held relative to the subjects.

On the 5th of February, 1717, only two years after the date of this contract of sale, Francis Sinclair granted a disposition of the lands and teinds of Sybsterwick to John Sinclair of Barrock, in which, while the extent of the payment for the teinds to the minister of Wick is precisely the same as that which is stipulated in the contract of sale with Lord Glenorchy, and while Francis Sinclair binds himself, almost in the same words as those of the contract, to relieve from all future augmentations of stipend, he, besides assigning John Sinclair into all the writs, titles, and securities, relative to the lands and teinds, made by any person whatever, specially and directly assigns the contract of vendition "passt betwixt the said John Lord Glenorchie and "me, bearing date the twenty-eighth day of March, and twenty "day of April, Iajvi and fifteen years, and registrat in the gene-"ral register of sasines, reversions, and renunciations, kept at "Edinburgh, upon the twenty-fifth day of May thereafter, "whereby the said John Lord Glenorchie not only discharges "the reversions competent to him, of the lands and teinds here-"by disponed, with several others, but also of new dispones the "same in my favours; and in and to the procuratorie of resig-"nation, clause of absolute warrandice, obligement for the tran-"suming the writs relating to the said lands, and haill others "clauses and obligements therein contained, conceived in my "favours, with all that has followed, or may follow thereupon." I cannot therefore doubt, that John Sinclair of Barrock thus

acquired all that belonged to Francis Sinclair, as to the lands and teinds of Subuster, under the contract of vendition of 1715; and seeing the unqualified terms of Lord Glenorchy's obligation to relieve from augmentations, it is not at all surprising that at the same time that he assigned Sinclair of Barrock into that obligation, by the express assignation of the contract of vendition containing it, in so far as concerned the lands and teinds disponed, Francis Sinclair should have supperadded his own obligation also to relieve from these augmentations. This he manifestly did, while relying on that which had been previously granted in his own favour.

Alexander Sinclair, his eldest son, was, in 1744, served heir to his father, John Sinclair of Barrock, and thereby acquired right to the unexecuted procuratory of resignation, with all the clauses of the disposition and contract 1715, by Lord Glenorchy, and also of that in Francis Sinclair's disposition of 1717, and every thing competent under it.

Alexander Sinclair afterwards disponed the same subjects to his brother John, and he again to Dunbar of Westfield, which dispositions contained assignations to all writs and evidents, as usual. The lands and teinds of Subuster were afterwards adjudged from Dunbar, and judicially sold to David Brodie, who was declared to "have right to the whole writs and evidents, "title-deeds, and securities, both old and new, of and concerning "the lands and others foresaid, purchased by him: haill heads, "clauses, tenor, and contents thereof, with all that has followed, "or is competent to follow thereupon."

Captain Brodie afterwards conveyed the same subjects, with a power of sale, to trustees, with an assignation to the whole writs, and in the most ample form, as they had been granted to his predecessors and authors, "and whole clauses therein con-"tained," &c.

These trustees again sold the subjects to the pursuer, who thus

came to be fully vested with the lands and teinds of Subuster, with an assignation " in and to the whole writs and evidents, " rights, titles and securities, of the said lands and teinds, and " others, made to and in favour of the acquirers, and their " authors and predecessors, and whole clauses therein contained, " with all that had followed, or might be competent to follow " thereon."

Under such circumstances, the question is, Whether the original obligation of relief from all augmentation of stipend granted by Lord Glenorchy, in the contract 1715, to Francis Sinclair, has not been transmitted to, and is now in the pursuer? I must own, that the impression which I first entertained, and which had originally led the Lord Ordinary, Mackenzie, expressly to sustain the pursuer's title, has not been altered on a reconsideration of the progress of titles from 1715 downwards with regard to the lands and teinds of Subuster.

The transaction completed between Lord Glenorchy and Francis Sinclair by the contract of vendition of 1715, was an onerous one in the strictest sense of the term, and full acknowledgment given of the receipt of the price originally stipulated for the wadset, and afterwards for the right of reversion. The limitation of the payment of teinds is clearly expressed, and the obligation of relief from all future augmentations of stipends, or other payment of teinds, is expressed in the clearest and most unambiguous terms. Within two years of the date of the contract of sale, the lands and teinds in question are disponed, but with an assignation, not conceived in the usual and general terms of all writs and evidents only, but in very particular terms, and expressly, into the contract of vendition of 1715, and to the clause of absolute warrandice and obligement therein contained. I think there can be no doubt, therefore, that Sinclair of Barrock, the disponee of Francis Sinclair, was thus put directly in the right of warrandice and relief that was conferred by that contract of vendition,

and that Lord Glenorchy could never have been heard in attempting to resist his enforcing the obligation against him.

The right being thus vested in the first disponee of the Barrock family, it passed by regular progress through the future assignations; and though they are not so special as the first in 1717, yet they are so conceived, as to go considerably beyond the ordinary clause of writs and evidents, as in making special reference not only to rights, titles, and securities, but "to the whole clauses "contained therein," so far as concerns the lands and teinds conveyed. This is, therefore, very little short of a special conveyance of assignation, and takes the case out of the operation of the decisions in the case of Graham *v.* Don, and Hamilton *v.* Lady Montgomerie, referred to by the defenders, where an ordinary general assignation to writs and evidents was attempted to be held sufficient to carry a right of a totally distinct and separate nature from that to which the writs and evidents assigned manifestly alone applied, namely, a long tack of teinds, when an ordinary conveyance of lands and teinds had alone been granted by the disposition in which the assignation to writs and evidents was contained.

Here the disposition or original conveyance, while it conveyed the teinds, definitely fixed the amount of the liability of payment to the minister of the parish, but declared that the lands should for ever after be relieved from all augmentations. The writ containing this obligation, with all its clauses, was assigned, and must be effectual to the assignee as one of his titles to the subject.

Those that acquired from the family of Barrock, and through whom the subjects have regularly come to the pursuer, obtained assignations nearly in similar terms, and that in favour of the pursuer, from the trustees of Captain Brodie, is ample and comprehensive, as we have seen.

It is a decided point in this litigation, that the warrandice and obligation in question has not been lost by the negative prescrip-

tion, in regard to augmentations that have been granted within forty years of the institution of this action. In whom, then, does the right exist, if it is not in the pursuer, who is now proprietor of the lands and teinds of Subuster by regular progress?

It is impossible to say that it is in the heirs of Francis Sinclair, the original purchaser, or in the family of Barrock, who disponed the whole subjects out and out; and from their disponees they have passed as clearly to the pursuer of this action.

As to the teinds of Wedderclett and Hauster, the case is somewhat different; but even with regard to the obligation regarding them, Lord Glenlee held the pursuer's title sufficient, in respect of the instrument of assignation in 1750 in favour of Alexander Sinclair.

It is said, however, that this instrument is erroneous, as the disposition therein recited of Francis Sinclair, in 1710, to George Sinclair of Stirkock, his brother, could not convey the procuratory of resignation in the contract of 1715, — and which, it is said, could not accresce to any prior right in favour of George Sinclair.

It appears that these lands of Wedderclett and Hauster had been wadset to Sinclair of Stirkock by Lord Glenorchy, as well as the other lands of Subuster, — as the contract makes express reference to it, and to a minute of agreement between the parties in 1706, and declares the right of reversion settled and discharged, and the whole matter finally concluded, both as to Wedderclett and Hauster and Subuster. The conveyance by disposition from Francis to George Sinclair, in 1710, was only of the fee of the former lands, reserving the liferent of Francis. But, however acquired, it is plain that John Sinclair of Barrock had come to adjudge the estates of George Sinclair of Stirkock, carrying off every right that he held to these lands of Wedderclett and Hauster, as well as others; and on John Sinclair's death, his son Alexander came to carry on a process

of ranking and sale, and ultimately obtained the instrument of resignation in 1750, already noticed, and a charter having followed under it, with infeftment, Alexander Sinclair of Barrock ultimately obtained a charter of sale, and he was infeft in the lands of Wedderclett and Hauster, and teinds thereof. He afterwards conveyed these lands to trustees, with an assignation in the broadest terms, "with the whole clauses of warran- "dice, and other clauses, tenor and contents thereof, and all "that has followed, or may follow upon the same."

Under the disposition from these trustees in favour of the pursuer, there is a similar assignation "of the writs and evidents "rights, titles, and securities of the said lands, teinds, and "others, made and granted in favour of the said Alexander "Sinclair, his predecessors and authors, and whole clauses of "warrandice, and other clauses therein contained, with all that "has followed, or may be competent to follow thereon, for "ever."

On the grounds I have already stated, I am also inclined to think that the right to enforce the obligation in question, regarding the lands of Wedderclett and Hauster, has been transmitted, and is now vested in the pursuer, though I admit there is certainly more room for hesitation than with regard to Subuster.

Lord Meadowbank. — In respect to the first part of my Lord Justice-Clerk's judgment I have no doubt whatever. I am of opinion that the assignation is in terms sufficiently broad to constitute a special assignation; and, in short, I entirely agree with his Lordship as to the lands of Subuster, and need not enter into the question. But I have much more doubt as to the other lands of Wedderclett and Hauster. These lands were separated altogether. I have so much doubt on this point, that I would rather hear what opinion has been formed by the rest of my brethren. I have paid every attention to what my Lord Justice-Clerk has

stated, but I think that the right of Sinclair did not accresce to these lands.

Lord Moncrieff. — The case is new to me, though some collateral matters were at one time before me. The question of negative prescription was before me, as one of the consulted Judges; but this question, as to the due transmission of the claim on the contract 1715, was not submitted to them.

This question does not seem to have been fully discussed, though pointedly stated, when the cause was formerly before the Court. It was adverted to, in general terms, by the Lord Justice-Clerk and Lord Glenlee; but the latter points at a distinction between Sybsterwick and the other lands. In the Report in the Faculty Collection, the point is scarcely mentioned in the argument for Mr Horne, and not at all in the argument for the defenders.

I think that there was ground for the remit. The point even as to Sybsterwick is not so clear to my mind as it seems to have been thought. But as to the other lands I think it more than doubtful.

1. Sybsterwick. — I think, on the whole, that the right in Lord Breadalbane's special warrandice has been effectually transmitted to Mr Horne. We must hold the obligation itself to be clear. It is in the contract of 1715, which conveys the lands and teinds of Sybsterwick to Francis Sinclair. It includes the lands and teinds of Wedderclett and Hauster. But lay that aside at present. By the disposition 1717, Francis Sinclair conveyed Sybsterwick, with the teinds, to John Sinclair of Barrock. The transmission of the special obligation of warrandice to Barrock does not depend on general clauses of writs and evidents. It is in express words assigned, as held by the contract 1715, previously executed. True, there is a qualification, "in so "far as the writs may extend to the disponee's security of the "lands and teinds conveyed, hail parts, pendicles, privileges,

"and universal pertinents thereof." I admit that it is a fair question, whether this restrains the use to be made of the writs assigned to the support of the conveyance of the heritable right to the teinds: And, to be sure, the special warrandice against augmentations of stipend is not necessary to that effect, but quite a distinct thing. But then the deed 1717, in specially assigning the contract 1715, and the procuratory, does so with all the obligements contained therein; and it cannot be doubted that the obligation of relief from augmentations was one of the privileges and pertinents of the teinds, which then stood in the person of Francis. To suppose that in specially conveying such a contract and procuratory, he did not assign the obligation distinctly expressed in both, for securing the freedom of the lands and teinds from future augmentations, would, in my apprehension, be to nullify the express assignment of the contract altogether, and to go against the plain meaning of that deed 1717. Therefore, I think it clear, that the right was effectually assigned to John Sinclair; and do not understand that the House of Lords doubted this. I should not think it at all conclusive that Francis Sinclair bound himself in a similar warrandice. That may cut both ways. He might hold the obligation for his own relief, while, without assigning it, he bound himself.

The more difficult question is, Whether the right has been transmitted from Francis, through the intermediate parties, to Mr Horne? I incline to think that it has. The title to this contract 1715 being once vested in John Sinclair by express conveyance in 1717, I think that it constituted one of the title-deeds of the lands and teinds, as they stood in him; and so that, according to the doctrine of Erskine, it must be held to have passed at least by the general clause of assignation of writs and evidents, in the subsequent dispositions. That passage, no doubt, relates generally to clauses of warrandice of the title of property of subjects conveyed. But once it is held,

that this right of relief for the protection of the lands and teinds against eviction of the fruits thereof, by augmentation of stipend to the minister, was vested in John Sinclair, it seems to follow, that the conveyance by him of the lands and teinds, (with all pertinents and privileges, as I must presume, though the deeds should have been produced,) and all the subsequent transmissions, carried that contract 1715, and all the obligations therein expressed, by virtue of that conveyance, and the general assignment of the writs and evidents for the support and protection thereof.

The case of Graham *v.* Don, Dec. 15, 1814, is the material authority against this. But I am inclined to think that there is a distinction, though I feel it to be narrower and more difficult than the pursuer argues. A tack of teinds is a separate title of property from an heritable right; and, therefore, as Lord Glenlee explained, in the case of Anstruther, it was held in Graham's case not to pass in a question of entail, by a general conveyance of writs and evidents intended for the support of a different title. I certainly hold an obligation of warrandice against future augmentations to be in itself a separate right from the right to teinds. But as, from its nature, it can only be useful to the proprietor of the lands or the teinds, I think that, when it does stand vested in the disponer of the lands and teinds at the date of a sale, it must be considered as one of the pertinents or privileges thereof, and therefore may be presumed to pass by the general assignment of writs, for the support of the whole title.

I own I should not rest much on the case of Mansfield *v.* Robertson, May 26, 1835. For, with all deference, I do not quite understand it according to the Report. An heritable right of teinds is held to be conveyed by a general assignment of writs and evidents, without one word of teinds in the disposition. That the purchaser of the lands was burdened with stipend was no reason, I should have thought, for such an inference, but rather the reverse. As proprietor of the lands without a right to teinds,

he would be properly so burdened; but why specially relieve the seller of all stipends, if neither lands nor teinds remained with him? The case of Anstruther appears to have little relation to the subject. There was a conveyance to the lands — and the only question was, if the party was *in titulo* to make the entail? The procuratory there in question was a personal title, necessary and sufficient to support the conveyance.

That the purchasers, in the present case, paid no value for the obligation of relief, is not irrelevant. It goes to the question of intention in the conveyances. But I do not think it solid. Though the sale and purchase might be made without reference to such a right of relief, — the subjects may be held to have been taken with all their qualities and adjuncts, *cum omni causa — tanquam optimum maximum.*

2. The question as to Wedderclett and Hauster appears to me to depend on principles essentially different. It is perhaps a nice matter. But I am of opinion that the pursuer has not established, that the right in the special warrandice in question as to these lands has been effectually transmitted to him.

The title stands on a disposition of these lands and teinds in 1710. That disposition, unlike that in 1717 as to Sybsterwick, neither did nor could contain any assignment of the contract 1715, or any obligation expressed in it; for the plain reason, that that contract did not exist till five years after its date.

It is here to be observed, that the title to all that was conveyed by the deed 1710 is perfectly good, requiring no aid from such an obligation. That obligation is something perfectly separate, and beyond the title to the lands and teinds; and Francis, having no such right in 1710, did not attempt to assign it. How then, is it to be held to have passed from him to George Sinclair, a person quite different from John, to whom it was assigned in 1717? The pursuer seems to make two points. He says, 1st, That there was some previous agreement in 1706, referred to

in the deed 1715; and that, in this view, the general assignment of writs must be held to carry the obligation of special warrandice. But if it be said that the obligation is transmitted by the general assignment of writs in 1710, does not the question present itself, where is the writ containing it, which was so assigned? No deed in 1706, nor any deed before the contract 1715, is produced. Then how can the Court hold, that such an extraneous obligation, to which no writ earlier than 1715 applies, actually passed by a general assignment of writs in 1710? It seems to me to be altogether impossible.

The reasoning on the instrument of resignation 1750 is still more fallacious. That instrument is *felo de se* as to this point. It bears to proceed on a procuratory of resignation contained in the contract 1715; and then proceeds, "which procuratory of "resignation, in so far as concerns the said lands of Wedder-"clett, &c., was disponed by the said Francis Sinclair to George "Sinclair his brother, conform to a disposition dated the 18th "day of May, 1710," &c. This is a contradiction in terms, which cannot make faith to any Court in the world, — a statement of a moral impossibility, — and certainly a statement of what is not true, the deed 1710 containing no disposition or assignment of any such procuratory. For it is not true, as assumed by the pursuer, that the only specialty as to Wedderclett, &c., is, that the disposition was in 1710, and before 1715. That is strong enough. But there is another specialty necessarily involved in it, viz., that the deed 1710 contains no assignment, either of the contract, or of the procuratory 1715, or of the right in question in any form. I see not, therefore, how it could pass by that title.

But, 2d, It is said that the title to it may have been acquired by George Sinclair, and so be transmitted to the pursuer, *jure accrescendi*. This is an entirely separate ground of title. If well founded, it requires no assignment of writs, either express or

implied. But there is really no room for the *jus accrescendi* in such a case. The obligation in the contract 1715 is not a separate title to the lands or to the teinds conveyed by the deed 1710. The title to these is perfectly good, and quite distinct from the personal obligation of relief from stipends. There is, therefore, nothing to which that obligation can accresce. Is is quite unnecessary in order to support the title to the lands and teinds, and it could give no support to that title. The fatal defect is, that there is no conveyance at all of any such right to George Sinclair in 1710, and, therefore, no writ or title subsequently acquired can accresce to the only right then given.

The case, in short, is, that Francis Sinclair, having himself no right of relief from augmentations, simply disponed the lands and teinds to George in 1710. He subsequently acquired an extraneous right of that kind. But he never assigned it to George, and, consequently, it never passed to the pursuer. The adjudication depending on these titles could not mend the matter: If the only warrants of it carried no right, it could not as a diligence create what did not exist. The end of this state of the titles may possibly be, either that these lands of Wedderclett, &c., were by mistake introduced into the contract 1715, or that, if it were intended to convey the obligation to the disponee, George Sinclair, that was never done. And then it is clear, that no purchaser can complain of its not being transmitted, seeing that it is certain that none of the purchasers paid any consideration in their purchases on account of it; but, on the contrary, that they purchased in the faith that the lands were to bear the burden of all future augmentations.

The Lord Justice-Clerk said, That his mind was much impressed with the view taken by Lord Moncrieff, as to the transmission of the right with regard to the teinds of Wedderclett and Hauster.

Lord Meadowbank expressed his concurrence with Lord Moncrieff.

The Lord Advocate then said, It was unfortunate that all the deeds had not been produced, because, ten to one, they would be asked for in the House of Lords.

The Lord Justice-Clerk said, He was never under the idea that they had not been produced.

The Lord Advocate said, He had a right to see the progress; and with their Lordships' permission, he would give in a minute calling on the other party to produce the whole progress.

The Lord Justice-Clerk thought that this was quite right for the Court, as well as for the parties.

Lord Moncrieff. — How can it be judged of without this, the question being the transmission from one party to another? Let the minute be given in to-day, and the interlocutor can be pronounced afterwards.

The appellants then gave in a minute calling upon the respondent to lodge in process "the whole titles of the estates of Syb-"ster; and, in particular, the following writs referred to in the "deduction of the title appended to the petition for applying the "remit of the House of Lords, viz., Disposition by Alexander "Sinclair of Barrock to John Sinclair, dated 22d August 1769, "and Disposition by John Sinclair to Thomas Dunbar of West-"field, dated 17th September, 1767; and the infeftments, if any, "on these dispositions; together with the inventories of the "title-deeds referred to in the conveyances of said estate."

Two instruments of sasine, bearing to proceed upon the dispositions specially mentioned in this minute, were produced, but did not in any way bear upon the question between the parties, and no other production was made.

On the 23d of January, 1841, the following interlocutor was pronounced, which was signed on the 29th of January.

" The Lords having advised this minute, with the extracts of " the sasines in favour of Captain Thomas Dunbar and of John " Sinclair, produced by the pursuer, Allow the same to be now " received; and farther, allow the pursuer to make production " of such other deeds as he may discover, in the view of fortify- " ing his claim in the present action."

And on the same 23d January, 1841, this other interlocutor was pronounced upon the remit from the House of Lords, and was likewise signed on the 29th January.

" The Lords having resumed consideration of the petition of " William Horne, Esq. of Scouthel, to apply the remit from the " House of Lords in the appeal of the trustees and executors of " the deceased John Marquess of Breadalbane, and in the cross- " appeal of the said William Horne, dated May 7th 1840, with " revised cases for the parties formerly ordered, and having " special regard to the terms of the foresaid remit, requiring this " Court 'to consider and state their opinion how far the obliga- " 'tion of warrandice under the contract of 1715, mentioned in " 'the appeals, has been duly transmitted to the pursuer, the " 'foresaid William Horne,' state and declare their opinion as " follows, viz. That the obligation of warrandice expressed in " said contract, of date the 28th day of March, 1715, in so far " as the same relates to the lands called Sybsterwick or Sub- " buster, and the teinds thereof; which lands and teinds, together " with the said contract, and all the obligements therein ex- " pressed, were conveyed by disposition of date the 6th day of " February, 1717, by Francis Sinclair to John Sinclair, has been " duly transmitted, by the several conveyances set forth in the " record and the revised cases for the parties, to the pursuer, the " said William Horne. But that the said obligation of warran- " dice in the said contract of 1715, in so far as the same relates, " or purports to relate, to the lands called Wedderclett and " Hauster, and the teinds thereof, which lands and teinds were,

" by the said Francis Sinclair, by a disposition bearing date the " 18th day of May, 1710, disponed to George Sinclair, has not, " by virtue of the deeds and documents founded on in this pro- " cess, been duly transmitted to the pursuer, the said William " Horne."

The case then returned to the House of Lords for argument upon this return to the remit.

Solicitor General and Walker for the appellants. — This House, on the former argument, was unable to see any transmission of the right of warrandice to the respondent, and the remit was made that he might supply this defect by new production of titles, — no production however has been made, and the case comes back, in this respect, exactly as it stood before the remit.

The title of the respondent as to Wedderclett and Hauster, is wholly without foundation, the claims as to these lands being through the deed of 1710, made at a time when the obligation of warrandice had not any existence.

The title of the respondent as to Sybster is somewhat different. In regard to this his case is, that Francis Sinclair conveyed to John Sinclair, and gave an assignation of all writs and evidents, and thereby passed to him the warrandice which he held; and that the right has in the same way passed to the respondent.

But it is quite possible that the right upon the warrandice may, in the intermediate period, have been dealt with in any supposeable way. Presumption is all against an implied conveyance, inasmuch as there were four augmentations, by each of which this right was disturbed, without the right having ever been set up by any of the parties to whom it is supposed to have been conveyed. The right was no way inherent in, or coherent with, the right to the lands or teinds, but was altogether separate and independent; its transmission must therefore be shewn by express deed. Even if it were conceded, that under the special terms of the assigna-

tion in the deed of 1717, the right was transmitted from Francis to John, where is the evidence of its future transmission in the subsequent conveyances in which these special terms do not exist.

The view taken by the Judges in the Court below was, that there is a regular express transmission by special assignation, and that a mere ordinary assignation of writs, &c. would not be sufficient; whereas, the view urged at the bar is, that such a transmission is not necessary. On examination, however, it will be seen, that the Court below has proceeded on assumption of a fact which has not any existence.

But, first, what is the nature and effects of an augmentation of stipend, and of the terms of this special warrandice in regard to it. Payment of stipend is a mere personal burden on the proprietor of the lands in respect of his possession, and an augmentation of the stipend is no more than an increase of this burden — the special warrandice of the deed of 1715 is a warranty against this increase, and has not any reference whatever to the title either of the lands or of the tithes. The warranty of title to either of these is a part of the feudal title by the law of Scotland, not requiring any express conveyance or assignment to make it effectual, but implied from the nature of the thing; and it is of this, that the authorities referred to by the respondent, *Ersk.* II. iii. 31; *Bank.* II. cxxiii. 3; and *Ross's Lectures*, are alone speaking. But the special warranty here was quite collateral to, and wholly irrespective of the title either of the land or the tithes. Though there had been an augmentation, that would not have been an eviction — the title to the tithe would have been untouched.

This special warrandice against augmentation, therefore, was no part of the title; and as covenants running with the land are not known in the law of Scotland, it could be carried only by a special assignation. This the Court below has considered necessary, and has assumed to exist.

But such an assignation is not contained even in the deed of 1717, the first step in the progress. Though this deed refers to the deed of 1715, it does not contain any recital of the special clause of warrandice; and the assignation contained in it is not special to the clause of warrandice, but is quite general, and even as such, is limited "so far as may concern or be extended to the "security of the lands, teinds, and others, and haill parts, pen- "dicles, privileges, and pertinents," and does not stop there, as read by Lord Moncrieff, but goes on, "and no farder."

[*Lord Chancellor.* — Lord Moncrieff's opinion would be consistent, if he considers this special warrandice a pertinent or privilege; but it could hardly be so — it was no way annexed to the land.]

That assignation was plainly not intended to do more than strengthen the title to the lands; for the clause is not usual, and except this special warranty, there was not any other matter to be embraced, by the exception in the words, "and no farder." But conceding that under the terms of the deed of 1717, the right was transmitted from Francis to John Sinclair, where is the evidence of its future transmission. In the subsequent conveyances, the special terms of the deed of 1717 do not occur. In the charter of resignation of 1750, and the sasines of 1767 and 1769, (the dispositions on which they proceeded never having been produced,) and even in the disposition of 1823, in favour of the respondent himself, there is no mention whatever of the special warranty, though in some there is a conveyance with "parts, pertinents, and privileges," and in others with "parts "and pertinents" only.

[*Lord Campbell.* — Admitting that there is no special assignation, then the particular words used, "parts and pertinents," or "parts, pertinents, and privileges," are immaterial.]

It would have been singular if the conveyance to the respondent had been otherwise, because the intermediate transmissions

from 1769 were under decrees of sale, where the augmentations of stipend were made deductions from the price, and any "other "augmentations were to be at the risk and hazard of the purchaser."

So far as to the fact of any special assignation existing. As to the authorities cited to shew that the right is carried without this, and by the mere conveyance of the lands, no such question either was or could be raised in Wilson *v.* Agnew. There the covenant was between superior and vassal, and it was repeated in every renewal of the investiture; and the main question was, whether the teinds formed a separate estate from the land, with which the granter of the mortification had never parted, or whether the exemption from farther payment of stipend formed part of the vassal's title to the tithe. And with regard to these cases, as to which it was said, that the objection taken here might have been, but was not raised, it does not appear from the facts, as stated, whether the objection could or not have been taken. But Graham *v.* Don, 18 *F. C.* 102, is an express authority that the assignation of writs is only for the purpose of enabling the disponee feudally to complete his title; and Hamilton *v.* Montgomerie, 12 *S.* and *D.* 349, shews, that even under the deed of 1717, the writings assigned were so assigned for the purpose only of perfecting rights created by other parts of the deed, and not for conveying other rights themselves.

Pemberton and Anderson for respondents. — When the cause was last before the House, an objection was taken in the reply, for the first time, to the title of the respondents to the obligation of warrandice; and as we did not anticipate, and were not prepared to answer the objection, and the Court below did not appear to have had the point under their consideration, the remit of 7th May, 1840, was in consequence made; and to this

question of title alone did we understand we were to address ourselves to-day.

[*Lord Chancellor.* — The House will hear the argument as if the noble Lord who formerly presided were here alone. There need not therefore be any repetition of the former argument, but counsel may confine themselves entirely to the question of title.]

The remit by this House was not for farther information on the facts, but that the Court below might state its opinion upon the title as a question of law, whether the deeds produced were sufficient to transfer the right claimed. Upon this point we admit, as to Sybster, that there is not any regular transmission of the special warrandice in the deed 1715; but we say, that we have a formal regular conveyance of the estate and titles feudally completed, and that that conveys all obligations in these titles.

The purchaser, under the deed of 1715, was not under any personal liability to pay stipend, his liability was solely in respect of his possesion of the teinds; and by the warrandice of that deed he possessed, under a contract, that he should be free from any augmentation, and should enjoy the lands, freed from any deduction from the profits beyond a fixed amount. — Whom could that contract benefit but the owner of the teinds?

Without any assignation to the special warrandice in the deed of 1715, it must, *ex necessitate*, go to the successor in the teinds. That no special assignation is necessary to carry rights inseparably annexed to the land, rests not upon principle only, but upon direct authority, *Ersk.* II. 3, 31; *Bank.* II. 123, 3; *Ross's Lec.*, vol. II., p. 311; *Bell on Titles, clause of war*, sec. 6, p. 64 and 69; Kyle *v.* Kyle, 17 *F. C.* 472; Wilson *v.* Agnew, 6 *F. C.* 256; 9 *S.* and *D.* 357.

As to Wedderclett and Hauster, the same principle applies, though the title is in somewhat different circumstances. The title of the respondent here is derived from the disposition of 1710,

and the objection is, that at that time the special warrandice in the deed of 1715 had not existence, and therefore he cannot have any right under it. But the disposition 1710 conveyed the teinds, and assigned to the disponee writs and evidents, and the feudal title, obtained by Francis the disponer, and completed in 1750 in the person of Alexander Sinclair by resignation, accresced to the previous disposition of 1710, and gave to the disponee the benefit of all rights which the disponer obtained by the deed of 1715, as if they had been in him at 1710; and thereby gave the disponee in the deed of 1710, and his successors, the full benefit of the special warrandice in the deed of 1715; *Ersk.* II., 7, 3; *Stair*, III., 2, 1; *Ross's Lect.*, p. 311, 316. The subsequent progress of titles does not bear any special assignation to the special warrandice in the deed of 1715, but upon the same principles that have been urged in regard to Sybster, the general assignation of writs throughout the progress, and the actual title to the lands and teinds, carried right to this special warrandice.

[*Lord Cottenham.* — The party did not convey the lands by the deed of 1715, freed from liability to augmentation, but only covenanted, that in case of augmentation, he should pay.

Lord Chancellor. — The pursuer is bound to pay, in the first instance, and the warrandice is only a covenant of insurance. The question is, Does that covenant run with the land? to use an English expression.]

The case of Wilson *v.* Agnew shews that it does; but there are many other cases in which the objection, that a special assignation is necessary to carry particular rights might have been taken, but was not, — M'Ritchie's Trustees, 14 *S.* and *D.* 578; Nisbet's Trustees *v.* Halket, *M'L. and Rob.* 53; 13 *S. and D.* 497; Cunningham *v.* Colquhoun, *Shaw's Teind Cases*, p. 175; Guthrie *v.* 1 *Bro. Supp.*, 75; Stuart *v.* Brewers in Glasgow, *Mor.* 24.

[*Lord Brougham.* — If the living were by any means put an

end to, the teinds would belong to the respondent, freed from stipend. Augmentation, therefore, cannot in any sense operate an eviction. The warranty is a mere covenant of insurance.]

LORD COTTENHAM. — My Lords, When this case was before your Lordships in the year 1840, an objection was taken, to which the attention of the House was drawn, I believe in the reply, at all events after a great deal of discussion had taken place, upon a question of some difficulty, whether the pursuer had stated and proved such a case as entitled him to call upon the defender to answer to him upon the alleged warrandice, which the original owner of the estate had entered into.

My Lords, I was very much struck with the objection which was raised, and according to my recollection, although the learned counsel had been heard when the objection was raised in the reply, yet thinking it right that they should have an opportunity, if they could, of removing that objection, I believe I put it to the learned counsel who were present, whether they had the means upon the papers then before them of removing the objection in the pursuer's title to sue the defender upon that alleged warrandice, and the learned counsel stated, that, upon the papers with which they were then furnished, they had not the means of so doing. I then stated, that, as to two of the parcels of which the estate consisted, I considered that what had been urged was quite conclusive, namely, that the pursuer, with respect to those two portions of the estate, had clearly not a right to connect himself with the warrandice, so as to sue for those portions of the estate; and I am represented to have said, which I have no doubt is quite correct, "What Sir William Follett has stated, disposes "of two of the estates, Wedderclett and Hauster, and regarding "Sybster, the pursuer must shew that he is entitled to the bene-"fit of the covenant of 1715, by being assigned into it." I then stated, that I did not see from the deeds printed, that he had

been so assigned to it. "That the pursuer himself had purchased "after many breaches of the obligation of warrandice had taken "place, by augmentations of stipend, was plain. He purchased "therefore only what remained, not the estate in its integrity. "Did he purchase what had ceased to be the property of the "apparent owner, relying on the warranty against augmenta- "tions? Did he purchase on the distinct footing of being en- "titled to this relief? If he did, it must appear in the deeds. "The sale could only be of what remained; a sale of the whole "was not consistent with the state of the case."

Under these circumstances, my Lords, entertaining and expressing a very clear opinion as to two portions of the estate, and being without any information as to the third portion of the estate, so as to see in what manner the pursuer connected himself with the relief which he sought, a remit was made to the Court of Session, and that remit was for the Court of Session "to con- "sider and state their opinion how far the obligation of war- "randice, under the contract of 1715, mentioned in the "appeals, has been duly transmitted to the pursuer."

My Lords, I am anxious to call your Lordships' attention to what took place upon that occasion, inasmuch as it appears to me, that some misapprehension has arisen in the Court below, as to the meaning of that remit. It has been supposed, that the House sent it back to the Court of Session, for the purpose of enabling the pursuer to amend his case, that is to say, to supply by evidence that which appeared to be defective in the case which he had originally brought under the consideration of the Court. That, I apprehend, would have been an exceedingly irregular proceeding, and one which it certainly was not the intention of the House to pursue in making this remit. It appeared that this objection had been altogether overlooked, not only by the Court, but in justice to the Court I must state, by the counsel for the defenders; and that the attention of all parties had been directed

to the point of the liability of the defenders, to the warrandice in question, without paying attention to the right which the pursuer might have to insist upon that warrandice, as against the defenders, if their liability existed to any person; that seemed to have been overlooked. It was for the purpose therefore of obtaining from the Court an opinion which they had not before expressed upon a question which did not seem to have been brought under their attention, as to how far the title to sue upon the warrandice had been transmitted to the pursuer, that is, according to the *allegata et probata* of the case.

When the case came before the Court of Session upon this point, the matter being sent without any distinction as to the different parcels, they having in the first instance been of opinion that the pursuer was entitled to the remedies he claimed as to all three portions of the estate, it appears to have been ultimately the unanimous opinion of all the learned Judges, (the Lord Justice-Clerk, having, in the first instance, stated a contrary opinion, but afterwards yielding to the arguments of the other Judges,) that as to those two portions of the estate upon which this House was satisfied upon the argument of the case when it was before them, there was no title whatever in the pursuer to raise the question as to the warrandice. The third remained for their consideration, and with respect to the third, the opinions of the Court of Session was, that the pursuer had succeeded in so connecting himself with the warrandice, as to entitle him to sue upon it, and that the defenders were liable upon it.

My Lords, upon that latter part of the case, therefore, it now comes under your Lordships' consideration. For though the question has again been raised at the bar, with respect to the other two portions of the estate, I have seen nothing whatever to alter the opinion which I submitted to your Lordships before, that the pursuer's case has entirely failed with respect to those two portions of the estate. That impression certainly is

strengthened by the unanimous opinion of the Court below, that that was the right construction to be put upon the transaction, with respect to those two portions of the estate.

My Lords, when the case came before the Court of Session again, upon that portion of the estate upon which they reported, that they thought the pursuer was entitled to the benefit of this warrandice, it appeared, that there had been no document whatever produced to the Court at the original hearing affecting the pursuer's title at all; and I will refer your Lordships to the statement upon the summons, that it may be seen in what way it was that the pursuer stated his case, as to the mode in which his title had been communicated to him. He stated "that the said John "Sinclair of Barrock was succeeded in the said lands and teinds "of Sybster," — that is the portion of the estate now in question, — "by his eldest son, Alexander Sinclair of Barrock, who after- "wards disponed them to his younger brother, John Sinclair of "Sybster. That the said John Sinclair of Sybster, in 1769, "disposed them with the writs and evidents, and whole tenor and "effect thereof, to Thomas Dunbar of Westfield." Through Thomas Dunbar, the pursuer claims. With respect, therefore, to the transmission of that property from Alexander to John, the statement is merely, that Alexander afterwards disponed it to his younger brother John, and that John afterwards disponed it to Dunbar. Then the transmission from Alexander to John, is merely stated as a transmission of the estate.

When the case came to be investigated in the Court of Session, up to the moment the learned Judges delivered their opinion, no document whatever had been produced. It did not appear in what manner, by what instrument, by what means, the title to the property had been transmitted from Alexander to John, or from John to Dunbar; and the opinions of the learned Judges were pronounced in the absence of any such documents. Before, however, the interlocutor was finally pronounced, it was suggested,

that the deeds themselves had not been produced, and the pursuer was undoubtedly treated with every possible indulgence, so as to give him every opportunity that he possibly could have, for making good his case, if case he had to make good; because, in that stage of the proceeding, the farther consideration was stayed in order to enable him to produce the instruments under which he claimed.

The party claimed the production particularly of a disposition by Alexander Sinclair to John Sinclair, dated the 22d of August, 1769, and a disposition by John Sinclair to Thomas Dunbar, of the 6th of December, 1768. Those two deeds, supposing that this warrandice had been properly communicated to Alexander, would have shewn the mode in which it had passed from Alexander to John Sinclair, and from John Sinclair to Dunbar. But, my Lords, those documents were not produced, and nothing was produced but an instrument of sasine, corresponding with these transactions as to the transfer of the property from one to the other, the instrument of sasine being totally silent as to this warrandice, taking no notice of it whatever, and professing to be merely a transfer of the land and teinds, with the parts, pendicles, and appurtenances to the said land whatsoever.

The question then will be, and the only question now for the consideration of your Lordships, whether, in that state of the evidence of the pursuer's title, it is possible to consider that he has made out his right, not as against the defender, to the benefit of this warrandice, which was the question discussed in the Court below, in the first instance; but the preliminary question which is to be decided, is, whether he has so connected himself with the warrandice, or contract rather, — for warrandice appears to me to be a term very inappropriately applied to the subject matter of the present discussion, — whether he has so connected himself with this contract as to entitle him to sue upon it.

My Lords, the attempt at the bar was, to shew the mere pos-

session of the lands carried with it a right to the benefit of this contract. Now if your Lordships call to mind what the nature of this contract is, and what right it is that the plaintiff claims in respect of this contract, I think your Lordships will be of opinion, that it is a very different thing indeed from what is ordinarily understood by the term "warrandice," or "warranty" according to the term used in the English law. It is a sale by one party to another of the teinds or tithes of the parish; according to the law of Scotland, that being a property in individuals, but always subject to be diminished by a portion of it being assigned by the legitimate authority, to the support of the minister of the parish —not as in this country, where the minister of the parish has the whole tithes — but the tithes being in the hands of individuals subject only to have a portion of them taken by the competent authority for the purpose of increasing the stipend of the minister. What, therefore, the one purchases from the other, is the teinds of the parish; the teinds of that parish being, like all other teinds, subject to this liability to be diminished in the hands of the individual, by being taken for the purpose of adding to the stipend of the minister. But the title to the teinds is not affected by the augmentation; the enjoyment of them is diminished, by a part of them being taken by legitimate authority for that purpose. But there may be a perfectly good title to the teinds; the title may be free from all objection, although a large portion, or the whole, may be taken for the purpose of being added to the minister's stipend.

The nature of this contract was this, — The party selling says, I sell you the teinds of this parish; the minister's stipend is now a certain amount, and I enter into a contract with you to indemnify you in the event of the minister's stipend being increased, so that the subject matter of your purchase shall be thereby diminished. In that event, and under those circumstances, I will

then undertake to repay to you, that which you may be compelled to pay out of your teinds to the minister of the parish. What connection has that with warrandice in the ordinary sense of the term? It is a contract perfectly collateral to the subject matter of the sale. It is a contract, that, in a particular event, happening to diminish the value of the property sold, the vendor shall come in and indemnify the pursuer against the diminution of income sustained by the exercise of that legitimate authority, by which part of the income arising from the teinds may be applied to the support of the minister.

That such a contract may be the subject of assignation, and may be passed from one hand to another, is not now in dispute. The question now in discussion is, whether the mere title to the lands, the mere circumstance of proving that the individual now instituting the suit, and prosecuting this claim, is in possession of the estate, necessarily carries with it a title to sue upon this contract.

My Lords, one great difficulty in the way of the pursuer undoubtedly is, that in supporting the decision of the Court below, he necessarily must, upon this point, throw over the reasoning of all the Judges, for they, one and all, maintain the title of the pursuer, not upon the ground of his being in possession of the lands, not because he has a title to the lands out of which the teinds are to arise, but upon the ground of there being evidence of this particular contract having been assigned to the pursuer, and that he connects himself by various transfers of the property, or transfers of the contract, with the title of the individual purchaser with whom the contract was entered into.

My Lords, the authorities cited, particularly in the judgment of Lord Moncreiff, which it is quite unnecessary for me therefore now to repeat to your Lordships, shew to demonstration, that, according to the law of Scotland, the right to the benefit

of contracts of this sort cannot be so appended to the title to the land, as to be the subject matter of a suit merely in respect of the possession of the land.

Then comes the question, If it requires a particular assignation of the benefit of this contract, what evidence have we of any such assignation? Upon this there is a total absence of all evidence. Those two deeds, if produced, might have contained evidence of such assignation, or what is much more probable from their not having been produced, they might have contained conclusive evidence that no such assignation was intended. What their contents may be we know not. They have not been produced, and if it is necessary for the pursuer to shew an assignation of this contract, he has not produced any document in which it is contained. Unless, therefore, it belongs to the land, passes with the land, and is necessarily available for the benefit of whoever may be in possession of the land, (an opinion which I apprehend your Lordships will not entertain,) then all the authorities and all the judges who have decided this case are against the title of the pursuer to the relief he prays.

My Lords, after having fully considered this case, and the reasons of the learned Judges, and the evidence adduced, I have not been able to find any evidence upon which it is possible to adjudicate in favour of the pursuer's right to sue upon this contract. The result, therefore, in my opinion is, that the pursuer has entirely failed to connect himself with this contract, and the question as to the nature of the contract, therefore, cannot arise. After the various opportunities which have been given to the pursuer to make out his case, with full notice of what was required, he has entirely failed to do so, and what I should submit to your Lordships, therefore, would be, that your Lordships should now reverse the judgment of the Court below — that instead of decreeing in favour of the pursuer, your Lordships should find that the defences are sustained. The party has instituted pro-

ceedings upon an alleged title, which title he has entirely failed to establish. I submit to your Lordships, that the judgment should be in favour of the defender in that suit, with the costs of the suit.

Mr Connell. — My Lords, is it intended to give the costs below or only the costs here?

Lord Brougham. — The costs below, the costs of the action from which we think he ought to be assoilzied, sustaining the defences.

Lord Cottenham. — Not the costs here.

Mr Connell. — There is a cross appeal of Mr Horne.

Lord Cottenham. — I am speaking of the appeal of the defender, who questions the title of the pursuer to obtain relief against the defender.

Mr Connell. — Mr Horne has brought a cross appeal here.

Lord Brougham. — There was no cross appeal originally, was there?

Mr Connell. — Yes, my Lord, there was a cross appeal by Mr Horne. The Court refused to allow him to go farther back in his claim than forty years, and he appealed upon that point.

Lord Brougham. — There was no different opinion come to in the Court below, originally, with respect to Wedderclett and Hauster, and with respect to Sibster. They found the pursuer entitled upon all three, and upon the remit, they changed their opinion as to Wedderclett and Hauster, and you appealed against that change of their opinion.

Mr Connell. — No, my Lord.

Lord Cottenham. — I am now speaking of the original appeals, the appeal which came originally before the house, upon which the remit was made. If the other noble and learned Lords concur with me in the opinion which I have found, the result will be, that the Court of Session were originally wrong as to all three. The consequence of that will be, that the pursuer came

before the Court of Session having no title; and putting ourselves in a situation to do what the Court below ought to have done, in our opinion, the pursuer having failed in making out his title, the defences have been sustained, and the pursuer will have to repay to the defender the costs of that proceeding. Of course, I do not say any thing of the costs of the appeal, because the judgment of the Court below has been altered upon that appeal, as to two portions in the first instance, and now as to the whole. I am speaking now as to the original appeal only. The result, therefore, will be to sustain that appeal without costs, reversing the judgment of the Court below, and making the pursuer pay the costs of the proceedings of the Court of Session. Do I rightly understand, that the pursuer has appealed as to the last decision of the Court of Session with respect to Wedderclett and Hauster?

Lord Brougham. — The decision upon the remit?

Mr Connell. — No, my Lord. I speak of the cross appeal.

Lord Brougham. — The Court originally, as I understand, found, and as we now think, erroneously found, for the pursuer, upon the whole three. Then the case went back, and upon the remit, the Court of Session changed its opinion so far as to agree with this house upon Wedderclett and Hauster, and to say that the pursuer had failed. Then, the Court having found against the pursuer, as to Wedderclett and Hauster, has not the pursuer brought that last finding upon the remit here by his present appeal?

Mr Connell. — There was no appeal when the case came back. It was a return of the opinions of the Judges.

Lord Brougham. — Then there is no appeal as to Wedderclett and Hauster.

Mr Connell. — No, my Lord.

Lord Brougham. — Is there a cross appeal as to what was done upon the remit?

Mr Connell. — No, there is no appeal at all, there is no judgment upon the subject. They merely pronounce an opinion in answer to the remit from this house. But Mr Horne, who failed upon one point, namely, as to going back beyond forty years, brought a cross appeal. Now, as this action has failed altogether, I submit, that Mr Horne's cross appeal ought to be dismissed with costs.

Lord Cottenham. — Do I rightly understand, that there is an appeal by the pursuer, complaining that he did not get enough in the Court of Session?

Mr Connell. — Yes, my Lord, I will read the words of the cross appeal. He appeals, "In so far as the interlocutor of "Lord Mackenzie excepts from the obligation of relief, those "portions of the stipend payable by your petitioner, under any "augmentation granted forty years before your petitioner in- "sisted in his present claim of relief, and the said interlocutors "of the Lords of the Second Division, dated" so and so, "in so "far as they sustain that exception."

Mr Spottiswoode. — That is upon the point of prescription.

Lord Cottenham. — Then I understand by that, that he claimed not only to be indemnified against the latter augmentations, but against augmentations which took place forty years before that time.

Mr Connell. — Yes, my Lord.

Lord Brougham. — He complained of the Court for not having given him enough.

Mr Connell. — Yes.

Lord Brougham. — We are of opinion, that they gave him too much. Therefore he must pay the expense of the cross appeal.

Lord Campbell. — My Lords, I entirely concur in the opinion which has been expressed by my noble and learned friend.

Lord Brougham. — My Lords, I also entirely concur.

Lord Cottenham. — I am authorized by the Lord Chancellor

to state, that he concurs in the view I have taken of the case.

Ordered and Adjudged, That the interlocutors, in so far as complained of in the original appeal, be reversed; that the defences stating objections to the title of the respondent, in the said original appeal be sustained; and that the action to which the appeals relate be dismissed with costs.

RICHARDSON and CONNELL — SPOTTISWOODE and ROBERTSON, Agents.

[*25th February*, 1842.]

JAMES BROWN of Eskmills, Appellant.

ALEX. ANNANDALE and SON, at Polton, Respondents.

Patent. — Use of an invention in England previous to the grant of a Scotch patent in regard to the same invention, voids the patent.

IN 1836, Brown obtained a patent for Scotland for a better and more perfect application of a vacuum under the endless web of paper-making machines. The patent recited, that Brown, by his petition, represented, "se invenisse aut excogitavisse in "vulgari, a certain improvement in the making of paper. "Quam inventionem haud unquam antehac factitatam aut usi- "tatam fuisse per ullum aliam personam aut personas quascunque "intra haec regna ut intellegit et credit," and was made under a proviso that it should be void if "dictam inventionem quoad "publicam ejus in illa parte regni nostri uniti Scotia vocata "usum et exercitium non esse novam inventionem vel a dicto "Jacobo Brown ut praedicitur non esse inventam," and another proviso, that the patent should not give any privilege as to any thing, "quod prius ab ullis subditis nostris quibuscunque ex- "cogitatum aut inventum publiceque in praedicta regni nostri "uniti parte Scotia vacata factitatum vel exercitatum fuerit "quibus simile literae patentes pro solo usu exercitio et beneficio "ejusdem antea concessæ fuerint." The patent farther contained a declaration, that it should be construed in the manner most favourable for the grantee, "tam intra omnes curias nos- "tras quam alibi et ab omnibus et singulis officiariis," and "in

" ea regni nostri uniti parte Scotia vocata et inter omnes et " singulos subditos nostros hæredum et successorum nostrorum " quoscunque et ubicunque."

Brown raised a suspension and interdict against Annandale and Son, and subsequently brought an action of damages against them for infringement of his patent. To this action Annandale and Son pleaded, among other things, that the invention was not new, but, on the contrary, was known and publicly used in England and Scotland, prior to the date of the patent. The action went to trial upon the following, among other issues, " Whether " at the paper-mill works of the defenders, subsequent to the " date of the letters patent, and the said specification, the de- " fenders, without the consent of the pursuer, wrongfully, and " in contravention of the said letters patent, used in their said " works, machinery in imitation of, and substantially the same " with, the machinery described in the said specification, to the " loss," &c. ? And, " Whether the said machinery described in " the said specification is not the original invention of the " pursuer ?"

At the trial of these issues the defenders tendered the evidence of witnesses to shew, " that the invention specified by the pursuer " had been publicly used in England before the date of the " patent." The pursuer objected that the previous use of the invention " in England was not a ground for invalidating the " pursuer's patent in Scotland." The Judge repelled the objection. The pursuer excepted to the Judge's opinion, and consented to a verdict for the defenders, " subject to exception to the opinion of the Judge," and a verdict was found accordingly. Subsequently the Court " disallowed the bill of exceptions; in " the suspension and interdict found the letters orderly pro- " ceeded; and in the action of damages assoilzied the de- " fenders."

Brown appealed from this interlocutor.

The Attorney General, and *Mr Andrews*, for the appellant. — Previous to the union of the two kingdoms, the Crown, by its prerogative, enjoyed the power of granting patents for inventions, which were then undoubtedly limited in every matter to Scotland alone. That power it enjoyed at common law, and independently of statute, and the power was not altered or taken away either by the union or by subsequent statute. The right of the Crown in England depends on the common law prerogative, and not on the 6th sect. of 21st Ja. I., cap. 3; that section only saved the right which previously existed from the effect of that statute. At all events, the 21st Ja. I. was not extended to Scotland, and the right of the Crown in that part of the kingdom depends now, as it did previous to the union, upon the royal prerogative. Accordingly, the operation of the patent is limited to Scotland, and is without any virtue on the south side of the Tweed; were it otherwise, the force of the patent would prevail in either part of the kingdom.

The only user, then, which can void the patent, is a user within that part of the kingdom to which the patent applies. If a party import an invention from beyond seas, he may, in his petition, state himself to be the inventor, or he may state that he has received a communication from abroad, and this will amount to his being the inventor, and be sufficient to authorize the Attorney General to make out the bill for the patent, otherwise the party would not be within the exception of the statute, Edgebury *v.* Stevens, 2 Salk. 477. England is a foreign country in regard to this matter, as it is as to many others.

[*Lord Chancellor.* — How do you get over "*haec regna?*"]

These words have reference to the words in the subsequent part of the patent, "intra eam partem Scotiam vocatam." And if the proviso should have been larger than it is, it may be questioned whether the patent is good, and if it is not, then all the existing patents are bad, for this is the usual form. But the

proviso is, that the patent shall be defeasible, if the invention is not new in so far as relates to its use in Scotland. There is no mention of England.

[*Lord Chancellor.* — If the patent be more extensive than it ought to be, the law will put a limit upon it.]

Throw out the proviso, and the question is, Whether the Crown has power to grant a patent for Scotland of what is known in England.

[*Lord Chancellor.* — The question is as to the limitation of the power of the Crown by the statute.]

The statute was declaratory only, and previous to it the Crown could make all reasonable grants; no doubt, in Roebuck and Garbutt *v.* Stirling and Sons, 5 *Bro. Supp.* 522; 1 *Hailes*, 566, the Court below held, that previous user in England vitiated a Scotch patent; but that decision was taken to appeal, and the judgment of the House affirmed the decision, "for other reasons "as well as the reason specified therein."

[*Lord Chancellor.* — That was a decision on the subject matter, for it included the reason in the interlocutor.

Lord Campbell. — Were the terms of the patent there the same as in this case?]

It appears so. But the respondents in that case did not put it upon user in England alone, as in this case.

[*Lord Brougham.* — Lord Mansfield assisted the House in the decision of that case, and must have come down on purpose, as he did not attend in the House either on the day before or after.]

Neither did they insist upon the user in England at all.

[*Lord Chancellor.* — The second reason of appeal raised the point distinctly.]

There was no one reason assigned which was directed to this point alone. In that second reason it is stated, that the invention was not only brought from England, but had been long in use in Scotland.

[*Lord Brougham.* — Whatever the Counsel might put this

case upon; this House put its judgment upon the individual point.]

That opinion will not, however, be binding upon the House, unless it was necessary for the decision of the case before it.

[*Lord Chancellor.* — The opinion is given, not as that of any noble lord, but is part of the judgment.]

It is quite clear, however, that in that case there had been a public user in Scotland, and your Lordships will observe, that no costs were given, probably because the House felt it necessary to adopt other reasons than those used in the Court below.

[*Lord Chancellor.* — A patent for the colonies, as well as for England, is in the same form as the ordinary patent for England alone. But if there had been a previous user in the colonies the patent would be void, because the colonies are part of the realm.]

They are so for some purposes, not for all. But sometimes a patent has been granted for the colonies separate from one for England, in cases where there must have been a user in England previous to the patent for the colonies. Kyan's patent, for instance, had been in use for some years in England before a patent was grated for the colonies.

[*Lord Chancellor.* — If at the union there had not been a great seal for Scotland the English patent would have embraced Scotland.]

If the Crown had the power, as undoubtedly it had previous to the union, to grant patents for inventions, and for inventions imported from England, there is nothing in the Articles of Union infringing on that right. The 6th Article refers to trade, and the 18th Article would rather save this right than otherwise.

[*Lord Chancellor.* — I don't think so much depends on those clauses as on the whole being made one realm.]

Then, under the 24th Article, which declares, that that seal shall be used for all instruments "which concern the whole king-"dom," the Great Seal of the United Kingdoms would be ufficient to make a patent for both parts of the kingdom, but

the subsequent part of the same article declares, that there shall be a Great Seal in Scotland, for all grants "relating to private rights "which have usually passed the Great Seal of Scotland," and which "only concern grants and private rights within that king-"dom." Patents, before the union, were sealed with the Great Seal of Scotland, and, since the union, they have been passed under the seal substituted for the Great Seal, by this article.

[*Lord Chancellor.* — That only affects the form under which the patent is to be made. It don't follow that this puts any restriction on the previous words "this realm" in the 22d article.]

In this matter the word realm can mean only England or Scotland, for if the two kingdoms were one as to patents, the Crown could not, under the 6th article, grant a patent for England alone, leaving the use of the invention open in Scotland, or *vice versa*, for in such case both parts of the kingdom would not be under "the same prohibitions, restrictions," &c.

[*Lord Brougham.* — There would not be any thing to hinder the Crown to grant an English patent for the counties south of the Tweed, but it could not do so if there had been a previous user in the counties to the north of that river.]

That is because of the 6th sect. of the 21st Ja. I., but the Articles of Union make no reference to that statute to extend it to Scotland, and for many purposes, such as jurisdiction, the two countries are quite distinct without any question.

The King *v.* Arkwright, *Davies' Cases*, has been relied on in the case for the respondents; but there the making was in England, though the party for whom the article was made was in Scotland; that plainly was sufficient to void the English patent. Clarke and Laycock is also founded upon on the strength of expressions used in regard to it by Lord Gardenstone, in Garbutt and Roebuck *v.* Stirling and Son.

[*Lord Chancellor.* — Clark *v.* Laycock was tried before Lord Mansfield, and he assisted this House in the decision of Roebuck's case.]

There is no English report of Clark v. Laycock.

[*Lord Chancellor.* — Respondent should shew where the statement he has put into Lord Gardenston's mouth comes from.

Mr Godson. — We took it from Lord Gardenston's judgment.

Lord Chancellor. — We have his judgment, and it does not contain any of the facts stated.]

Mr Kelly and Mr Godson appeared for the respondents, but they were not called upon to address the House.

Lord Brougham. — The case of Roebuck v. Stirling appears to me perfectly to decide this case. The Court of Session had dismissed the suit, because it appeared that the process in question was known to, and practised by, different persons in England. This House adjudged, "That the interlocutors complained of be "affirmed for other reasons, as well as the reasons specified "therein." That implies, that they concurred in the reasons thus given on the face of the interlocutor. What other reasons there may have been for the affirmance may be a question, but that reason was put forward by the Court below, as the ground of its decision, and being so put forward, was, at all events, one of the reasons for the affirmance of the judgment, with other reasons not stated by the House.

Lord Campbell. — There is an express decision, applying, in its terms, to the present, just as much as if other reasons had not been introduced into the judgment of the House. That being an express decision upon the point in question, unless it is shewn, that the House was under some great mistake at the time, it must be considered as binding. I entirely concur in the decision. I think it is perfectly right, and if it had been *res integra*, I should have so decided, but especially, after that decision, I perfectly concur in the affirmance of the judgment of the Court below. My opinion is, that the law was quite correctly laid down by this House in the year 1744.

Lord Brougham. — When I stated, that I proceeded on the decision of this House in Roebuck *v.* Stirling, in the year 1744, I intended to have added, that I should have so decided without that precedent. I entirely agree with my noble and learned friend, that if this had been *res integra*, I should have so decided it.

Lord Chancellor. — Mr Andrews has stated, that several opinions have been taken, in Scotland, upon this subject.

Mr Andrews. —No, my Lord, in England.

Lord Chancellor. — When the case came before one Judge, he decided it in the way in which we think he ought to have decided it. Then it afterwards went before the full Court, and they were unanimous in their judgment, corresponding with the previous decision of this House: and, with respect to the previous decision of this House, we have searched the Journal, and we find, that the Lord Chancellor was present, and not only the Lord Chancellor, but that Lord Mansfield was present.

Mr Kelly. — My Lords, I am instructed, with my learned friend, Mr Godson, to appear in support of the judgment of the Court below. Your Lordships proposing to affirm that judgment without hearing the respondent's counsel, I trust, I may be permitted to ask, that it may be affirmed with costs, being directly in the face of a judgment of this House.

Mr Andrews. — I trust your Lordships will consider, that there was no argument allowed in the Court below.

Lord Chancellor. — I think it must be affirmed with costs.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

G. and T. W. WEBSTER — SHEARMAN and EVANS, Agents.

[25th February, 1842.]

GEORGE NAPIER & Co. Brewers in Edinburgh, Appellants.

MRS BRUCE, at Portobello, Respondent.

Prin. and Surety.—Terms of bond by surety for an agent, held not to be such as to give the surety notice of, and make him liable for, intromissions with the moneys of the principal previous to the date of the agent's appointment.

ON the 18th February, 1836, George Napier, in behalf of Messrs Napier & Co. addressed the following letter to James Bruce:—"Sir, Agreeably to my promise to-day, I now state "the terms upon which we are prepared to enter into an "arrangement with you for the sale of our ales in London.

"1st, We agree to furnish you with horses and drays, "counting-house, and cellars, and public books, all of which are "understood to belong to us.

"2d, The ale will be charged to you at the usual prices, viz. "48s. 58s. 68s. and 78s. per barrel, and at such other price or "prices under the first as may be considered by us most suitable, "to correspond with those charged by the generality of the "brewers of Edinburgh.

"3d, You are to guarantee the whole debts; and, from the "above prices, we agree to allow twenty-five per cent in full of "commission, guarantee, five per cent discount to customers, "horses' keep, and all other charges whatever after the ale has "been put on board at Leith, with the exception of two barrels "per hundred, which are allowed for filling up in London; and

" which two barrels, or two per cent, is to be considered suffi-
" cient in all seasons for this purpose; but it is expressly under-
" stood, that the aforesaid twenty-five per cent does not extend
" to ale returned, or upon which an allowance (agreeably to
" article sixth) has been made, but you shall be entitled to
" charge the expenses incurred by you, which shall not exceed
" 4s. per barrel.

" 4th, The credit to customers is understood to be twenty-
" eight days, and it is expected that the payments will be kept
" as nearly to this period as possible; but in order to give suffi-
" cient time for all debts to be collected, we agree to extend the
" period of credit to ten weeks, after which time we shall be at
" liberty to draw a bill on you at two months, for such sum or
" sums as may appear from the books to have exceeded the last-
" mentioned period of ten weeks, which bill you will be required
" to accept.

" 5th, You are also to guarantee the safe return of empty
" casks within four months; but, as soon as they are shipped,
" and your letter, (accompanied by a receipt from the captain
" or wharfinger, when practicable,) advising the conveyance,
" quantity, and number of casks returned, they will be con-
" sidered as at our risk. It is hereby therefore understood,
" that, in case any casks shall be lost, or shall not be returned
" within four months from the date of invoice, we shall then be
" at liberty to charge you with the same, at the market price at
" the time; provided, that in case you shall return in good
" order, within eight months, any casks already paid for, then
" you will be entitled to a return or allowance of the amount so
" paid.

" 6th, That in case any fault shall be found with any ale,
" complaint must be made to us by letter (within thirty-five
" days from the time of its arrival in London, during the period
" between the first day of November and the first day of June

" following, or within twenty-one days during the period from " the first day of June to the first day of November following, " in any year,) specifying the brewing and number of casks so " complained of, in which case, it shall be optional for us to " have the same returned here, or sold, as we may determine; " but in the event of any such ale being sent out, and in the " cellars of any customer, it may be necessary that an allowance " be made, in preference to their returning the same, in which " case, it is also expected and required that such complaint be " made to you, conform to delivery-book on this point, and the " same conveyed to us forthwith for our determination.

" 7th, It is also required that you do not sell, or be in any " way connected with any other house in the sale of ales; while " it is agreed that you may sell whisky; provided that, in doing " so, it is not found prejudicial to our interest.

" 8th, The travellers are to be under your entire direction and " control; but, in case of dismissal, it is expected that we be " consulted. Therefore it is agreed that all engagements pre- " viously entered into with them, shall be binding upon you, the " same as if these had originated with you.

" 9th, Account sales to be transmitted on every Saturday of " each week, agreeably to a form already in practice; also a " statement of all moneys collected during the period, accom- " panied by a remittance for the amount, under deduction of " your commission of twenty-five per cent, agreeably to a form " also in practice; which last shall contain a statement of any " allowances made to customers, or expenses incurred on any " ale returned, agreeably to article sixth. Copies of these forms " are now forwarded to you.

" 10th, Two sufficient securities will be required to the " amount of L.1000, who will agree to enter into a bond for " this purpose, subjecting themselves always to the conditions " and stipulations herein contained: and it is understood that

" heritable security will be given to that extent, and that one-
" half of the expense of the bond or assignation, and the infeft-
" ment following upon it, be paid by you, and the necessary
" deed is to be executed by you and your securities, so soon as it
" can be prepared.

" 11th, Two months' notice will be given and required, in the
" event of a separation; and, in case of any dispute or difference
" arising in any of the aforementioned articles, it is hereby
" agreed, that these shall be submitted to men mutually chosen
" for this purpose, with power to choose an oversman, whose
" award shall be final. I remain, your obedient servant, (Signed)
" For self and partner, GEO. NAPIER."

On the 8th of March, James Bruce accepted of the terms specified in the preceding letter, by letter addressed by him to Messrs Napier and Co. He did not, however, succeed in obtaining security to the amount required, and in consequence he proposed, that, instead of complying with the stipulation for security, his mother should deposit L.1000, in the hands of Messrs Napier & Co. to answer this purpose. Messrs Napier & Co. agreed to this, and the arrangements between them and Mrs Bruce was reduced into a bond, bearing date the 30th March and 2d April, 1836, which was in the following terms: — " Know all men by
" these presents, that we, George Augustus Frederick Cunning-
" hame, captain in His Majesty's seventh regiment of Dragoon
" Guards, presently at , and George Napier, brewer
" in Edinburgh, carrying on business as copartners, under the
" firm of George Napier and Company, brewers in Edinburgh,
" considering that, by holograph letter of date the 18th day of
" February last, subscribed by me the said George Napier, for
" myself and my said partner, on behalf of the said copartnership
" of George Napier and Company, and addressed to James
" Duncan Bruce, an arrangement was proposed to him the said
" James Duncan Bruce to act as agent for us the said George

" Napier and Company for the sale of our ales in London, upon " the following considerations: — *Primo*, That we should furnish " the said James Duncan Bruce with horses and drays, counting- " house and cellars, and public books, all of which were under- " stood to belong to us. *Secundo*, That the ales to be shipped " by us to the said James Duncan Bruce should be charged at " the usual prices, viz. 48s. 58s. 68s. and 78s. per barrel, and at " such other price or prices under the first, as might be con- " sidered by us the said George Napier and Company, as most " suitable to correspond with those charged by the generality of " the brewers in Edinburgh. *Tertio*, That the said James " Duncan Bruce was to guarantee the whole debts, and that, " from the above prices, we should allow him twenty-five per " cent in full of commission, guarantee, five per cent discount to " customers, horses' keep, and all other charges whatever, after " the ales had been put on board at Leith, with the exception of " two barrels in the hundred, which should be allowed for filling " up in London, and which two barrels were to be considered " sufficient in all seasons for that purpose; but that it should be " expressly understood, that the aforesaid twenty-five per cent " should not extend to ale returned, or upon which an allowance, " agreeably to article sixth, should be made, but that the said " James Duncan Bruce should be entitled to charge the expenses " incurred by him, which should not exceed 4s. per barrel. " *Quarto*, That the credit allowed to customers should be " twenty-eight days, and that the said James Duncan Bruce " should keep their payments as nearly to that period as possible; " but, in order to give sufficient time for all debts to be " collected, we the said George Napier and Company agreed to " extend the period of credit to ten weeks, after which time we " should be at liberty to draw a bill on him, the said James " Duncan Bruce, at two months' date, for such sum or sums as " might appear from the books to be kept by him to have

" exceeded the last-mentioned period of ten weeks, which bill " he, the said James Duncan Bruce, would be required to " accept. *Quinto*, That the said James Duncan Bruce was to " guarantee the safe returns of empty casks within four months, " but as soon as they were shipped, and his letter, accompanied " by a receipt from the captain or wharfinger, when practicable, " advising the conveyance, quantity, and numbers of casks " returned, they should be considered at our risk; and that in " case any casks should be lost, or should not be returned within " four months from the date of invoice, we, the said George " Napier and Company, should then be at liberty to charge the " said James Duncan Bruce with the same, at the market price at " the time; provided that in case he should return in good order, " within eight months, any casks already paid for, then he should " be entitled to a return or allowance of the amount so paid. " *Sexto*, That in case any fault should be found with any ale, com- " plaint must be made to us, by letter, within thirty-five days from " the time of its arrival in London, during the period between " the first day of November and the first day of June following, " or within twenty-one days during the period from the first day " of June to the first day of November following in any year, " specifying the brewing and numbers of casks so complained of, " in which case it should be optional for us to have the same " returned or sold, as we might determine; but in the event of " any such ale being sent out, and in the cellars of any customer, " as it might be necessary that an allowance should be made, in " preference to their returning the same, then, and in that case, " it was expected and required that such complaint should be " made to the said James Duncan Bruce, conform to delivery " book on this point, and the same conveyed to us forthwith for " our determination. *Septimo*, The said James Duncan Bruce " should not sell, or be in any way connected with any other " house in the sale of ales; but that he might sell whisky, pro-

" vided that in doing so it was not found prejudicial to our " interest. *Octavo*, That the travellers are to be under the said " James Duncan Bruce's entire direction and control; but, in " case of dismissal, it is expected that we should be consulted, " and therefore, all engagements previously entered into with " them should be binding upon the said James Duncan Bruce, " the same as if these had originated with himself. *Nono*, That " account-sales should be transmitted on every Saturday of each " week, agreeably to a form already in practice; also a statement " of all moneys collected during the like period, accompanied by " a remittance for the amount, under deduction of the said James " Duncan Bruce's commission of twenty-five per cent, agreeably " to a form also in practice, which last should contain a state- " ment of any allowances made to customers, or expenses incurred " on any ale returned agreeably to article sixth, and copies of " which forms were furnished to the said James Duncan Bruce. " *Decimo*, That the said James Duncan Bruce should find two " sufficient securities to the amount of L.1000 sterling, who " should agree to enter into a bond for that purpose, subjecting " themselves always to the conditions and stipulations contained " in the said missive letter and above expressed, and that " heritable security should be given to that extent, and that one- " half of the expense of the bond or assignation, and the infeft- " ment following upon it, be paid by the said James Duncan " Bruce, and that the necessary deed should be executed by him " and his securities so soon as it could be prepared. *Undecimo*, " That two months' notice should be given and required in the " event of a change or separation, and in case of any dispute " or difference arising in any of the aforementioned articles, " that the same should be submitted to men mutually chosen, " with power to choose an oversman, whose award should be final; " and considering that, by holograph letter, of date the 8th day " of March, 1836, addressed to us, the said George Napier and

" Company, by the said James Duncan Bruce, he, the said " James Duncan Bruce, fully agreed to the whole of the above- " recited conditions and stipulations, and, in consequence thereof, " has since commenced to act as our agent in London: And " farther, considering that it being inconvenient for the said " James Duncan Bruce at present to grant or to find the heri- " table security stipulated for by article tenth of the above- " recited agreement, and that his mother, Mrs Ann Bruce, relict " of Alexander Bruce, Esq., late collector of excise in Argyle, " presently residing in Buccleuch Place, Edinburgh, who had " agreed to become one of his sureties, has undertaken to place " in our hands the sum of L.1000 sterling, in lieu of such secu- " rity, on our granting these presents in manner underwritten, " and that we have agreed to receive and to hold the same, in " the place and stead of such security which was to have been " granted to us; and now, seeing that the said Mrs Ann Bruce " has paid over to us, the said George Napier and Company, " the aforesaid sum of L.1000 sterling, whereof we, the saids " George Augustus Frederick Cunninghame, and George Napier, " as a company, and as individuals, do hereby acknowledge the " receipt, renouncing all objections to the contrary; which sum " of L.1000 sterling, we the said George Augustus Frederick " Cunninghame, and George Napier, co-partners, under the " said firm of George Napier and Company, bind and oblige " ourselves, jointly and severally, and our heirs, executors, and " successors whomsoever, as well as the said copartnership of " George Napier and Company, to repay, with and under the " conditions and provisions after written, to the said Mrs Ann " Bruce, and to her heirs, executors, and assignees, at the term " of Martinmas next, with a fifth part more of said principal " sum of liquidate penalty in case of failure, and the interest of " the said principal sum, at the rate of four and a half per centum, " per annum, from the date of these presents to the aforesaid

" term of payment, and thereafter during the non-payment " thereof, and that at two terms in the year, Martinmas and " Whitsundy, beginning the first payment of the said interest at " the said term of Martinmas next, for the proportion thereof " which shall be due at that term, and the next payment of the " same at the term of Whitsunday 1837, for the half-year im- " mediately preceding, and so forth by equal portions, at the " said two terms, yearly, termly, and continually thereafter, so " long as the said principal sum shall remain unpaid: But " providing and declaring, as it is hereby specially provided and " declared, that, notwithstanding the obligation before written, " the said Mrs Ann Bruce shall have no right to demand pay- " ment of the aforesaid principal sum of L.1000 sterling, at the " aforesaid terms, unless the whole conditions and stipulations of " the above-recited agreement with the said James Duncan " Bruce shall have been fulfilled, while the said agreement shall " subsist and be in operation, and which stipulations and agree- " ments she becomes bound and obliged, as by acceptance hereof " she binds and obliges herself, and her heirs, executors, and " successors, to see fulfilled, and that so long only as the said " agreement shall subsist and be in operation; and, in particular, " the said Mrs Ann Bruce is bound and obliged, as by accep- " tance hereof she binds and obliges herself, and her foresaids, " that, during the whole time the said James Duncan Bruce " shall continue to act as agent foresaid, in consequence of the " above-recited agreement, he shall well and truly account for " and pay to us all sums of money received by him on our " account, and likewise account for and pay to us the value of " all ales sold by him for us, and the value of all barrels sent to " him in terms of his said agreement with us, and whatever loss, " damage, or expense shall be sustained or incurred by us through " the intromissions of the said James Duncan Bruce, the said " Mrs Ann Bruce, by acceptance hereof, binds and obliges her-

" self, and her foresaids, to content and pay to us the said George " Napier, and Company, to the extent of the foresaid sum of " L.1000 sterling, or to allow us to retain the same out of the " aforesaid sum of L.1000 sterling, which has been deposited in " our hands for the express purpose as aforesaid; and upon the " said loss or damage being ascertained and fixed in manner " specified in the said agreement, we the said George Napier and " Company shall only be bound and obliged to make payment " to the said Mrs Ann Bruce of the balance remaining due of " the aforesaid sum of L.1000 sterling, after satisfying and pay- " ing the amount of such loss or damage; and the said Mrs Ann " Bruce, on receiving payment of such balance, shall be bound " and obliged to grant a valid and sufficient discharge to us of " the bond and obligation above written, and of the whole terms " thereof, it being expressly understood and declared, that the " aforesaid sum of L.1000 sterling, is placed in our hands as a " security for the intromissions of the said James Duncan Bruce, " in virtue of his said agreement, and to indemnify us against all " loss or damage that may be sustained by us in consequence " thereof: But it is likewise hereby specially provided and " declared, that we shall be bound and obliged, as we hereby " bind and oblige ourselves, and our foresaids, and our said " copartnership, to repay the aforesaid sum of L.1000 sterling, " with such interest, at the rate of four and a half per cent., as " may be due thereon at the time to the said Mrs Ann Bruce " and her foresaids, on receiving two months' previous notice in " writing from her or them to that effect, and on satisfactory " heritable or other sufficient security to the extent foresaid being " found to us, in terms of the tenth article of the above-recited " agreement with the said James Duncan Bruce: And we " consent," &c.

James Bruce left Scotland for London, and entered upon the agency on the 1st April 1836, but continued in it only until

the month of September following, Messers Napier & Co. becoming so dissatisfied with his conduct, that they summarily dismissed him, and took possession of all the books and papers of the agency.

Messrs Napier and Co. then brought action against Mrs Bruce, setting forth the bond which had been granted by her to them, that James Bruce was indebted to them in L.284, 14s. 7d. over and above the £1,000 deposited with them by Mrs Bruce, and concluding, that it should be found that she had not any right to demand payment of that sum, that they were entitled to retain it in extinction *pro tanto* of James Bruce's debt to them, and that Mrs Bruce ought to be decreed to grant a discharge of their bond. And with the view of avoiding a defence, that they had not discussed the principal debtor, they subsequently brought action against James Bruce, setting forth, that he was indebted to them in L.1360, 13s. 10d. conform to account current, and concluding, that the two actions should be conjoined, and that James Bruce should be decreed to pay to them the sum of L.1368, 13s. 10d. with the interest of L.1264, 15s. from the 19th day of October 1837.

The debt thus alleged to be owing by James Bruce, was brought out by debiting him with the price of, and charges relating to, ale, which had been sent to London, and was in the cellars previous to, and at the time of his entering upon the agency, and which, by the authority of Napier and Co., had been sold for prices greatly under those specified in the art. 2d of the arrangement, the proceeds amounting in all to L.411, 12s. and by farther debiting him with a sum of L.210, 17s. as the price of ale which had been sold previously to his entering upon the agency, but which had been received by him.

The actions having been conjoined, the Lord Ordinary (14th November, 1839) found that Mrs Bruce, under the conditions of the bond, was "not liable for the value of the ale which was in

" London prior to the commencement of her son's agency, but " that she was liable for the prices of such parts thereof as were " actually received by him after his agency commenced, and that " she was not liable for the debts due to the company prior to " the commencement of her son's agency, except in so far as " they were recovered by him after his agency commenced."

The Court, on reclaiming note, (11th February, 1840,) altered the Lord Ordinary's interlocutor, and found, that Mrs Bruce, as cautioner, " was not liable for the prices of any ales which were " in the cellars of the pursuers, in London, prior to the com- " mencement of the agency, though received by James Bruce " after its commencement."

Messrs Napier and Co. appealed from both interlocutors.

Mr Kelly and *Mr Willmore*, for the appellants. — The respondents, in support of their case, founded on the 2d and 4th articles of the letter, as transcribed into the bond, as overriding the whole, and shewing that the surety could not be intended to be, or be liable for the price of ales which had been sent to London previous to the agreement. But these articles are only two of several distinct heads of agreement, and by no means control the meaning of the others, unless there is something to shew that this must necessarily be so. But on the contrary, the introductory part of the letter articulately refers to the sale of ales " in London," and if the construction contended for were allowed, what would become of article 3? would not the agent, in case he had sold ale already in London, have been entitled to the per centage stipulated by that article, or would he have been without any claim in that respect? Again, if any of the ale already on hand had become faulty, or been complained of, would the agent not have been bound to comply as to it with the terms of article 6? or would he have been at liberty wholly to disregard the protection of the

principals which that article was intended to secure? or, if the agent had sold any of the ale on hand, would he have been bound to account for the price under the terms of article 9th? or would he have been at liberty to account for this at his own time and pleasure?

In construing the contract, the object and intention of the parties is to be collected from their situation and the subject of the contract. The parties must be taken to have been acquainted with that about which they were dealing, and in the nature of things, it must necessarily have been, that at any given period of a business such as that of the appellants', there would be stock on hand and debts outstanding; could it have been the intention of the parties, that these should be left wholly without protection, or that the principals must themselves have come to London, or employed another agent, or made a separate arrangement with the agent they were appointing in regard to them?

[*Lord Chancellor.* — What is there to shew, that the surety, whatever may have passed between, or been known to the other parties, was aware of the state of matters previously, either as to stock on hand or outstanding debts?]

The very nature of this business must have given her knowledge of this. Besides, the 18th article speaks of travellers as already in employment, and the 9th, of "forms in practice," and the 4th shews, that credit was given to customers by the course of the business, and would be running as to sales previous to the appointment.

[*Lord Chancellor.* — How was the surety to know that there had not been any interval between the appointment of her son, and the removal of the former agent, and that old scores had not been cleared off?]

Unless the surety was to be liable for the outstanding debts received by the agent, no meaning can be attached to those words in the obligatory part of the bond, that the agent should

account for all sums "received by him on our account;" this could only refer to the outstanding debts and ale on hand, previous to the arrangement, as the subsequent words were alone applicable to transactions under the arrangement; and it is a rule of construction, that no part of a contract is to be made of no effect if it is possible to avoid doing so.

[*Lord Chancellor.* — Suppose the agent should have sold ale under the price fixed by article 2, he would have been bound, under the words, "received on our account," to account for the prices so received, but under the words of the next clause he would also have been bound, over and above that, to account for the value of the ale.]

That case would come under the clause of indemnification. The prices fixed by article 2 might not be the actual value: on the whole, we submit that the obligatory parts of the bond are to be taken as explanatory of any thing which is vague in the terms of the letter, as engrossed in the bond.

With regard to the stock in hand at the date of the agent entering, the introductory paragraph of the letter is sufficient to shew, that this was embraced by the arrangement.

[*Lord Chancellor.* — Is there any thing to shew that the surety was aware this was not a new speculation?]

Yes. The terms of articles 8 and 9, to which I have already alluded.

[*Lord Chancellor.* — It is remarkable, that in article 2 there is no mention of any ales already in London, or of any prices to be affixed to them.

Lord Brougham. — It is quite consistent with the articles, that there may have been an interval between the appointment of the agent and his predecessor leaving.

Lord Chancellor. — We can't say what may have passed between the principal and the agent, but the surety is bound only by her written contract. The words, "to be shipped," are not

in article 2d of the letter, but are in the letter as engrossed in the bond. The surety may have bargained for this. Is there any thing to extend the meaning of the words "to be shipped?"]

We submit that this is only one part of the agreement, not overriding the whole; the introductory part is for the sale of ales "in London."

[*Lord Chancellor.* — That is general enough to be sure, but the 2d article fixes it to ales "to be shipped."

Lord Brougham. — And the 6th article speaks of 35 days from arrival in London.]

We say only two articles, 2d and 6th, speak of future shipments, but that the rest of the agreement may refer to the general arrangement of such a business, and to the stock already in London.

[*Lord Abinger.* — The question is, what information did the bond give the surety?]

If the surety chose, she might become responsible for ale already in London, and the bond embraces such a case. Instruments are to be construed strictly against those who make them.

Counsel for respondents not called upon.

LORD CHANCELLOR. — We are all of opinion, that the construction of the Court below is the correct construction, and that the interlocutors ought to be affirmed.

Ordered and Adjudged, that the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

ARCH. GRAHAME — G. and T. WEBSTER, Agents.

[28*th February*, 1842.]

The RIGHT HONOURABLE JOHN ARCHIBALD MURRAY, Lord Advocate of Scotland, in name and behalf of her Majesty, and of the Commissioners of her Majesty's Woods, Forests, Land Revenues, Works, and Buildings; Appellant.

The HONOURABLE COSPATRICK ALEXANDER HORNE, commonly called LORD DUNGLAS, and CAPTAIN ROBERT CUNNINGHAM, Respondents.

Expenses. — The Lord Advocate, suing on behalf of the Crown, or of any officers in whom the revenue of the Crown is vested, is not liable for costs of the action, whether competently or incompetently brought in its form, or otherwise.

Appeal. — The Lord Advocate, suing on behalf of the Crown, or of officers in whom the revenue of the Crown is vested, is not bound to enter into recognizances.

Appeal. — Where the liability of the Crown for costs was in dispute, the competency of an appeal on that subject was sustained.

THE appellant brought action against the respondents for reducing a commission under the Great Seal of Scotland, whereby the respondent, Lord Dunglas, had been appointed chamberlain, or collector, for life, of the rents and casualties arising out of the lordship of Ettrick Forest, and a deputation or factory, whereby his Lordship had appointed the respondent, Cunningham, to be his deputy. The grounds of reduction being, that his Majesty King George the Fourth, by whom the commission had been granted, had no power to make the grant for a period exceeding his own life.

The first, among a variety of defences, pleaded by the respondents to this action was, that the action was not competent at

the instance of the Commissioners of Woods and Forests, and could only be instituted by the Officers of State.

A record was made up upon the summons, and defences, and condescendence, and answers, and thereafter, cases, and revised cases, were given in for the parties, and ultimately, a hearing in presence was ordered by the Court. In the written pleadings it was insisted on behalf of the appellant, that the action was at the instance of the Crown, as well as the Commissioners of Woods and Forests. This was denied by the respondents, and was farther met by the objection, that the Lord Advocate had no power, *virtute officii*, to sue on behalf of the Crown, and could only do so under a special warrant applicable to the particular action. To meet this objection there was produced a warrant from the Crown, "ratifying and confirming the whole proceedings in the "said action, prior to the date hereof, and authorizing the action "to be proceeded in."

On December, 1836, the Court pronounced the following interlocutor, "The Lords having resumed consideration of this "processs, with the cases for the parties, and heard counsel "thereon, sustain the objection to the title of the pursuers to "insist in these actions, dismiss the same accordingly, and "decerns. — Find the Commissioners of Woods and Forests "liable to the defenders in the expenses of process, allows the "accounts to be given in, and thereafter remit to the auditor to "tax the same and to report."

On a subsequent day, 10th February, 1837, the Court pronounced this other interlocutor, "The Lords having advised this "account with the report of the auditor thereon, approve of the "same, and decern for payment to the defenders of L.284, 14s. 8d. "of expenses of process, together with the dues of extract, and "allow this decree to go out and be extracted in the name of "Gibson and Horne, W.S., agents for the defenders."

A new action was then brought at the instance of the Officers

of State, and in that action the Court below ultimately decerned in terms of the libel. After this decree had been made an appeal was taken against the interlocutors in the original action. The respondents objected before the appeal committtee, that the appeal could not be entertained, because recognizances had not been entered into within the time required. The committee reserved consideration of the objection until the hearing of the appeal. Subsequently the respondents carried the decree pronounced in the second action to appeal. The second appeal in the second action was heard on the 20th February last, and stands over for judgment. The first appeal in the original action was heard this day (28th February.)

Mr Attorney General and *Mr Anderson*, for the appellant. — The merits of this action have been already heard in the appeal taken by the present respondents. The only questions, therefore, with which we shall trouble your lordships, will be two, 1st, The liability of the Crown to pay costs; and 2d, The title of the Lord Advocate to sue in the form which was adopted. The question as to the recognizances reserved by the appeal committee is dependent on the liability for costs, we will therefore consider these two questions together, leaving the question of title for subsequent argument.

[*Lord Chancellor.* — If the Lord Advocate be not liable to pay costs, whether he succeed or fail, it will not be necessary to enter into the question of title.]

Mr Attorney. — Except in the view, that the question of liability should be decided against the Advocate.

[*Lord Chancellor.* — It will be convenient to have the question of costs argued first: because, in one view, the question of competency may not arise.]

It is the admitted prerogative of the Crown, suing directly by its law officers, not to pay costs, in any case. There is no dis-

tinction recognized between suits at the direct instance of the Crown, and suits by particular departments of the Government. The prerogative is not a privilege personal to the monarch, for his private benefit, but appertains to him in his public capacity, and for the public benefit. In every matter in which the Crown is concerned in England, it appears to plead by the Attorney General, but in no case is the Attorney General liable to pay costs. Even in Exchequer, where the informations are by private parties, at the suit of the Attorney General, neither the Attorney General nor the particular department of the Government which he for the time represents, has ever been made liable to pay costs. The prerogative is co-extensive in both parts of the kingdom, and the exemption is equally recognized in Scotland as in England, in all cases where the Lord Advocate sues on behalf of the Crown, or any department of the executive Government.

William the Fourth, on his accession to the throne, surrendered the hereditary revenues of the Crown in Scotland to Parliament for disposal, and by 1 Will. IV. cap. 25, they were declared to form part of the consolidated fund. By the 3d and 4th Will. IV. cap. 112, the powers of the Commissioners of Woods and Forests were extended to the management and disposition of the land revenue of the Crown in Scotland. The interest of that board is just like that of the treasury, or any other public board, for public purposes only; and this action is at their instance, in assertion of their public duty as officers of the Crown, representing the public. And the Lord Advocate is on the record merely as the public officer through whom the Crown, either directly, or by its public boards, institutes legal proceedings.

[*Lord Chancellor.* — As the summons is printed the Commissioners are not parties on the record.]

This makes the case still clearer.

[*Lord Cottenham.* — By the interlocutor there is not any order upon the Lord Advocate.

Lord Brougham. — All the argument in the case appears to be directed against the Lord Advocate, but that question cannot arise.

Lord Chancellor. — The first reason of appeal is, "Because the "appellant, as Lord Advocate, has an undoubted title to pro-"secute."]

The argument on principle is fully supported by practical considerations. If the judgment is not obeyed, it must be enforced by the ordinary diligence of the law, — by letters of horning: if these letters are not obeyed, by denunciation of the party as a rebel, and afterwards by poinding and sale; but this is to involve the matter in a palpable absurdity. If the Commissioners represent the Crown, how, by possibility, could the ordinary form of letters of horning be adopted, or denunciation of rebellion be made? or of what effects could poinding and sale be made? it must be of the Crown property, for assuredly it could not be of the private effects of the Commissioners or the Lord Advocate.

If the Commissioners or the Lord Advocate, whichever be the proper party to deal with on the state of the record, represents the Crown, and the Crown, as so represented, is never liable for costs, that disposes of the question as to the necessity of entering into recognizances. And the practice is conformable to the principle; for with the exception of a short period after 1809, while Mr Mundell held the office of Crown solicitor, there is no instance of recognizances entered into by the Lord Advocate, or for the Crown represented by its public officers. During Mr Mundell's tenure of office he appears, on some occasions, to have entered into recognizances, and on others to have omitted doing so, but on none of these occasions does the matter appear to have been at all under consideration, or made the subject of discussion. And here, again, practical considerations support the argument

on principle, for the recognizances are taken to the Crown, and if the costs are not paid, the payment can only be enforced by estreating the recognizances, and issuing a writ of extent; but for the sale of what effects? not of the Commissioners or of the Lord Advocate, but of the Crown in this case also.

Mr Pemberton and Mr Hope, for the Respondents.

[*Lord Brougham.* — There is no order upon the Crown, it is upon the Commissioners of Woods and Forests. But what Commissioners? there is a new set, the body does not exist against whom the interlocutor is directed.

Lord Chancellor. — Suppose the interlocutor to be right. How could you proceed against the Commissioners?"]

If they acted tortiously they must be personally liable.

[*Lord Brougham.* — But how could you enforce that liability in England, the Commissioners not being the same?]

Against the Commissioners personally who did the act, and the heirs and representatives of such of them as may be dead.

This action was brought by the Lord Advocate originally, without any warrant for so doing, and was, therefore, in its foundation incompetent, so far as it was agreed to be an action at the instance of the Crown. Being so incompetent, the warrant subsequently produced did not remedy the matter. But, moreover, the Court below has determined, that there was no instance by the Crown; that the action was, in truth, at the instance of the Commissioners of Woods and Forests alone, and that the Commissioners had no title to sue. The Commissioners then, in raising this action, were not exercising the powers vested in them by statute, but were proceeding in excess of these powers, and in so doing, were guilty of a tortious act, for which they must be personally responsible.

But setting aside this view, immunity from costs is no part of the prerogative of the Crown. If it were so it must prevail in

all cases, and be guarded in all courts. In England, liability for costs was not known at common law. It was introduced by the statute of Gloucester; and the immunity of the Crown, so far as it may have existed, arose from the Crown not having been mentioned in the statute. Even in England there is a diversity of practice as to this immunity, King *v.* Hassell, *M'Lell.* 110; Attorney *v.* Joyce, *Hayes Exchequer*, 205. And in Scotland the liability of public officers, suing on behalf of the Crown, to pay costs, was acknowledged in Lords of the Treasury *v.* Campbell's Trustees, 14 *D.* and *B.* 657.

[*Mr Attorney.* — In point of fact, the costs in that case were never paid.

Lord Cottenham. — Because there was nobody against whom to recover them.]

It was also recognized in The Advocate *v.* Magistrates of Kirkwall, 10 *S.* and *D.* 328. Were it not so, public functionaries might take up any man's estate, or do any tortious act in regard to it, and under the shelter of the prerogative be exempt from all liability for the costs of redress.

[*Lord Campbell.* — Would the relief against such an improper act not be in Parliament?

Lord Chancellor. — That relief might depend in some degree on the majority or the minority — would it not?]

The rule in Scotland is, that where the Crown sues directly by the Lord Advocate, it is not liable for costs, but where it sues indirectly by a public board, then costs are given, Lords of Treasury *v.* Campbell's Trustees, *ut supra.* And the 17 sec. of 10 Geo. IV. shews, that it was not considered that immunity from costs would attach to the powers conferred upon the Commissioners of Woods and Forests, for special provision is made by it as to the fund out of which the debts of suits at law or in equity against the Commissioners, are to be provided.

[*Lord Brougham.* — There is nothing in the act about "proceedings," it applies only to "instruments," &c.

Lord Chancellor. — As the revenue was vested in the Commissioners, it was necessary that the Commissioners should be enabled to sue, — they are just substituted for the Crown. And the 17th section is to protect persons dealing with the Commissioners by making the revenue liable for these dealings, at the same time saving the Commissioners from personal liability. What do you say, Mr Attorney, as to the case of Campbell's Trustees?

Mr Attorney. — The judgment in that case was against the Lords of the Treasury. And the expenses never have been, and never will be paid.]

In Monk *v.* Huskisson, 4 *Russ*, 121, *n.* a suit for specific performance against the Commissioners of Woods and Forests, the Commissioners excepted to the Master's report, and the general rule as to costs was not departed from.

[*Mr Attorney.* — In that case the Commissioners had signed the contract in their own individual names.

Lord Brougham. — That case came under the 17th sect. of 10 Geo. IV.]

Lord Chancellor. — It does not appear to me that there is any invariable practice upon this subject, the only question referred to is a question of fact; and certainly I should hesitate very much if there was a settled practice, an invariable practice, as it is said in the courts of Scotland, in cases of this kind. It does not appear to me, that that individual judgment, in that individual case, is sufficient to justify this House in coming to that conclusion.

Mr Hope. — My Lord, such a custom is urged in the other case to which I have referred, the case in the 14th volume of Dunlop and Bell, and is admitted by the other side.

Lord Chancellor. — I see nothing in the case to satisfy me that there is any thing of the kind admitted by the counsel for the Crown.

Mr Hope. — It is said that the Officers of Ordinance, and Excise, and Customs, are liable.

Lord Chancellor. — That is said at the bar; but the Court say, How can you make them liable?

Mr Hope. — That observation, my Lord, applies to that particular case. The counsel on the other side admit that case, but say it is not in point.

Mr Attorney General. — I must object to the interference of my learned friend, citing a case after the reply, and when your lordships were expressing your opinion.

Lord Brougham. — I do not see that there is any assent to what the counsel says, by any body. The Lord Justice Clerk says, "I would like to know how you could make good such "a claim of expenses. I think you are bound to point out the "fund, and how you are to operate upon it."

Mr Hope. — The Solicitor General says, the cases put are not in point, being cases in which the Crown is not directly a party.

Lord Chancellor. — If the cases are not in point, it is unnecessary to consider cases which are wholly inapplicable to this case. I certainly do not see that there is any settled rule applicable to this case in the way conceived by the Court below.

Mr Pemberton. — Then I would submit, my Lord, the question of costs would be matter of discretion with the judge, and if so, not the subject of appeal to your Lordships' House.

Lord Chancellor. — It is a question of principle, whether or not the Crown is liable to costs when it sues in this form.

Mr Pemberton. — If your Lordships see there is no settled rule, it must of course depend upon the discretion of the judge.

Mr Attorney General. — I must object to my learned friend replying on me, and much more replying on your lordships.

Lord Brougham. — What was intended by the Lord Chancellor was, that there was no settled rule to take the Scotch cases out of the general rule.

Mr Pemberton. — I understood the Lord Chancellor's observation to be, that there was no general rule.

Lord Campbell. — It is quite impossible that that rule could be of any standing.

Lord Chancellor. — The earliest case cited is one in the same year with the present proceeding.

Lord Brougham. —That case is unintelligible. It is no authority.

Lord Chancellor. — I feel, certainly, what the Lord Chief Justice Clerk says, you are bound to shew you can enforce the claim against some party.

Lord Brougham. — I certainly agree with my noble and learned friend. I consider the case referred to in *Shaw* and *Dunlop*, the case of Campbell's Trustees, to be a case that cannot at all lead us to the conclusion, that there is a different rule prevailing in Scotland, from that which is held to govern the question, as often as it is raised here; and the other case, in the 10th volume of *Shaw* and *Dunlop*, the earlier case in 1832, appears to me, so far as it proves any thing, to go the other way. I must beg to enter my protest against the distinction which has been taken in arguing this case, both here and below, as to the prerogatives of the Crown being different, where the Crown is supposed to be dealing with what is called its private and individual property, and the public property; the prerogative of the Crown is precisely the same as regards what is called the property of the Sovereign, and the property of the public. It is only within the last half century that any private property has been acknowledged to exist in the Crown at all; prior to that, all lands descending on the Crown, even from ancestors or collateral relatives, were held *jure corone*. All the property of the Crown is

held for public purposes, and is Crown property, except that which the individual Sovereign has retained a right to deal with in his private and personal capacity; it is public property which the Crown administers for the maintenance of the state. With respect to the Crown lands, they are as much public property as any other property connected with the consolidated fund, or connected with any other branch of the revenue; those lands are vested in the Crown for public purposes, to maintain the dignity of the Crown, and the prerogative applies as much to them as it does to any other branch of the revenue appropriated to other services.

LORD COTTENHAM. — My Lords, I am entirely of the same opinion. I apprehend there is no difference, and it would be strange indeed if there were a difference between the prerogative of the Crown in Scotland upon this point, and the prerogative of the Crown in any other part of the kingdom. The Attorney General in this country, and the Lord Advocate in Scotland, equally represent the Crown; they are only acting for the Crown, and are not liable for costs. Then, is this, or is it not, a proceeding by the Lord Advocate on behalf of the public? Beyond all doubt it is. Whether the particular property is under the management of the Lords of the Treasury, or under the management of the Commissioners of Woods and Forests, is quite immaterial; the suit is for the benefit of the public, and as my noble and learned friend has remarked in the course of the argument, whether the public revenue is subject to an arrangement which leaves it in particular officers, or in the hands of the Crown, the prerogative of the Crown is not altered by that arrangement. The public officer suing for certain property in Scotland, the great question is, whether he is liable for costs, because the Court are of opinion there was an informality in the mode in which the Crown has instituted its suit; it would require

a very strong practice to raise such a point, but when we come to look into the supposed authorities which have been referred to, it is clear they are no such authorities. From the case in the 10th volume of *Shaw* and *Dunlop*, it is clear the rule did not exist; and when we come to the 14th volume of *Shaw* and *Dunlop*, it is pretty clear that there was nothing antecedent to that, no case is referred to antecedent to that; and if that principle cannot be recognized, that cannot be a reason why this House should sanction this interlocutor of December 1836, on a decision in the month of March in the same year. I consider the interlocutor of the Court of Session erroneous. I think, therefore, your Lordships would do right in reversing it.

Lord Campbell. — I entirely concur.

Ordered and Adjudged, That the prayer of the respondents' petition to dismiss the appeal as incompetent, be, and the same is hereby refused: And it is farther Ordered and Declared, that according to the usage of this House, the Lord Advocate for Scotland, when suing as such on behalf of the Crown, or in matters in which the Crown is interested, upon presenting an appeal to this House, is not required to enter into a recognizance to answer the costs of the said appeal: And it is farther Ordered and Adjudged, that the said interlocutors of the 24th of December, 1836, and of the 10th of February, 1837, complained of in the said appeal, so far as the same relate to the costs ordered to be paid by the appellants, the Commissioners of her Majesty's Woods, Forests, Land Revenues, Works, and Buildings, be and the same are hereby reversed: And this House does not, under the circumstances, think it necessary to give any opinion as to the objection to the title of the pursuer to insist in the action, nor as to the other matters contained in the said interlocutors complained of in the said appeal.

PEMBERTON, CRAWLEY, and GARDNER — SPOTTISWOODE and ROBERTSON, Agents.

[Heard, 30*th March*, 1841. — Judgment, 28*th Feb.* 1842.]

ARCHIBALD THOMAS FREDERICK FRASER, Appellant.

THE RIGHT HONOURABLE THOMAS ALEXANDER LORD LOVAT, Respondent.

Entail. — Reference in one deed to another, held sufficient to authorize a decree, directing an entail of lands in terms of the deed referred to, to be executed by the party called as institute, and already in possession under a title made up in fee-simple.

Ibid.—Terms of deeds, under which a party was held to be called as a substitute, not an institute of entail.

Res Judicata. — Held, that a decision in competing actions for the fee-simple of lands, as given by different deeds, did not form *res judicata* against the unsuccessful party in these actions, subsequently seeking to establish, that the successful party must hold under the fetters of an entail created by the same deeds.

IN 1805, the Honourable Archibald Fraser executed an entail of lands lying in the parishes of Boleskin and Abertarff "in "favour of myself and the heirs-male of my body; whom failing, "to such other heirs as I, or failing me, the heir-male of my "body for the time, shall name and appoint under my or his "hand; whom failing, to and in favour of my heirs whatsoever." This deed contained a recital of a previous entail executed by the maker in favour of a different series of heirs, which had been reduced at his instance.

On the 25th June, 1808, the same Archibald Fraser disponed to his grandson, "Thomas Frederick Fraser," son of his son Simon Fraser, "and to the heirs to be lawfully procreated of his "body; whom failing, to Archibald Fraser M'Pherson, my "nephew, and the heirs of his body; whom failing, to "Fraser, the second son of Sir William Fraser of Ledclune; "whom failing, to the heirs of his body; whom failing, to such

" person or persons as I shall name by writing, heritably and " irredeemably, and with and under the provisions and restric- " tions after-mentioned, all and whole," certain subjects in the towns of Inverness and Campbeltown; " As also, all and sundry, " and all and every other lands and heritages which belong or " may belong to me at the time of my death, and which may " not be otherwise settled and disponed by me," and his whole personal means and estate; " reserving always my own liferent " right and use of the haill subjects above disponed, both herit- " able and moveable, with full power and liberty to me, at any " period of my life, or even on deathbed, to alter, innovate, and " revoke these presents, in whole or in part; to sell, alienate, " and dispone the lands and other heritages before mentioned, " or any part thereof, or to contract debt thereupon."

On the 15th day of August, 1808, Archibald Fraser, describing himself as " heritable proprietor of the lands, teinds, and " others, after described," likewise executed another deed of entail, whereby he disponed " to and in favour of the nearest " legitimate male issue of my ancestor Hugh Lord Fraser of " Lovat, namely, Thomas Alexander Fraser of Strichen, being " the nearest lawful heir-male of the deceased Alexander Fraser " of Strichen, and his heirs-male; whom failing, to and in favour " of the late Hugh Fraser of Struie, and the heirs-male of his " body; whom failing, to and in favour of the nearest lawful " heir-male of the late William Fraser of Kilbockie, and his " heirs-male; whom failing, to and in favour of Simon Fraser, " Esquire of Faraline, and his heirs-male; whom failing, to and " in favour of the person who shall be then able to prove him- " self to be the chief of the clan Fraser, by legitimate descent " from Hugh first Lord Lovat, and his heirs-male; whom all " failing, to and in favour of my own nearest lawful heirs and " assignees whatsoever, heritably and irredeemably, All and " Whole, the following parts and portions of the lands of Aber- " tarff, and others after-mentioned, as well the *dominium utile*,

" or property, as the *dominium directum*, or superiority of the " same, now standing in my person in fee-simple, through the " failure of heirs of my body, namely, all and whole," &c. " and farther, all and whole the following lands and others " lately acquired by me, namely, all and whole the first lot of " the lands and barony of Auld Castlehill," by their description; then lots three and four, lot and lot five of Auld Castlehill, each lot being particularly described, under the burden of certain annuities and legacies, and a condition, " that the said Thomas " Alexander Fraser, and the heirs of tailzie and provision hereby " appointed," should be obliged to bear and retain the arms and designation of Fraser of Abertarff. " And with and under the " condition and provision also, that the said Thomas Alexander " Fraser, the nearest heir-male of the said deceased Alexander " Fraser of Strichen, and the heirs of tailzie and provision hereby " appointed, shall be obliged to possess and enjoy the lands and " estates hereby disponed in virtue hereof, and under the pre- " sent tailzie, infeftments, rights, and conveyances to follow " hereupon, and by no other right or title whatsoever, as also to " cause engross, and *verbatim* insert, the foresaid course and " order of succession, and the several conditions, burdens, provi- " sions, limitations, restrictions, clauses irritant and resolutive, " declarations, and others herein contained; and that in the " instruments of resignation, charters, and infeftments, to follow " thereon, and in all the subsequent procuratories and instru- " ments of resignation, charters, special retours, services, instru- " ments of sasine, and other transmissions and investitures of the " said lands and estates, and that so long as the same remain " burdens upon, and do or may affect the said lands and estates " in any manner or way: And with and under this condition " also, that the said Thomas Alexander Fraser, the nearest heir- " male of the said deceased Alexander Fraser of Strichen, and " my whole heirs of tailzie and provision, shall be obliged to " make payment of the whole foresaid sums of money, annuities,

" and others above specified, from time to time, as the same may " fall due in manner before mentioned, with any other sums of " money or annuities which I may leave or provide, and declare " a burden affecting the foresaid lands and estates; together also " with the feu-duties, &c. reserving always to myself full power " and liberty, at any time of my life, and even in the article of " death, to revoke, alter, or innovate, these presents, in whole " or in part, and to burden and affect the same with such addi- " tional sums of money, annuities, and others, and also with such " conditions, provisions, and irritancies, as I may see proper."

On the 26th July, 1811, Archibald Fraser executed a trust-disposition, in favour of Campbell and others, of his whole lands and heritages, including specifically the lands of Abertarff, as described in the deed of 1805, " now standing in my person in " fee-simple, through the failure of heirs of my body; but " excepting always herefrom the lands and barony of Auld " Castlehill, both property and superiority, belonging to me; " and also all other lands and heritages not therein specially dis- " poned, which may be contained in any deeds of entail, or other " settlements executed or to be executed by me, and which shall " remain uncancelled or unrevoked at the time of my death," upon trust to execute " a deed of entail, with prohibitory, irritant, " and resolutive clauses of the foresaid lands and estate of Aber- " tarff, above described, and likewise of the whole unentailed " property belonging to me, and which may remain undisposed " of, after fulfilling the different purposes of this trust, and to " settle and secure the whole of said subjects, *omni habili modo*, " by registration of the said entail, and completing such titles " thereon as shall be deemed expedient, to and upon the nearest " legitimate male issue of my ancestor, Hugh Lord Fraser of " Lovat, namely, the nearest lawful heir-male of the deceased " Alexander Fraser, late of Strichen, and his heirs-male; whom " failing, Hugh Fraser, now of Struie, and the heirs-male of his " body; whom failing, the nearest lawful heir-male of the late

" William Fraser of Kilbockie, and his heirs-male; whom fail-
" ing, John Fraser, Esquire of Faraline, and his heirs-male;
" whom failing, Sir William Fraser of Ledclune, Baronet, and
" his heirs; whom failing, the said James Fraser of Berkley
" Square, London, and his heirs-male; whom failing, Alexander
" Fraser of Lincoln's Inn, London, and his heirs-male; whom
" failing, the person who shall be then able to prove himself to
" be chief of the clan Fraser, by legitimate descent from Hugh
" first Lord Lovat, and his heirs-male whatsoever. — Reserving
" always to myself power and liberty, at any time of my life, and
" even in the article of death, to revoke, alter, or innovate these
" presents, in whole or in part, and to burden and affect the
" same with such additional conditions and provisions as I may
" see proper: But declaring that the same, in so far as not
" altered by me, shall be effectual, albeit found lying in my
" custody at my death, or in the custody of any other person to
" whom I may see fit to intrust the same undelivered; with the
" not delivery whereof I hereby dispense for ever: And I
" hereby revoke and recall all former dispositions, deeds of trust,
" and settlements of the premises hereby conveyed, executed by
" me at any time heretofore."

On the 13th or 30th day of June, 1812, Archibald Fraser executed another deed, whereby he disponed to " Thomas " Frederick Fraser, and the heirs-male to be lawfully procreated " of his body, in fee," and a series of heirs, " heritably and irre-" deemably, all and sundry lands, tenements, houses, heritages " and heritable subjects of every denomination, property and " superiority, now belonging to me, or that may belong to me, " and lying within the parish of Inverness, but without prejudice " to the disposition formerly granted by me in favour of the said " Thomas Frederick Fraser, and particularly without prejudice " to the foresaid generality, all and whole the lands and barony " of Castlehill, otherwise called Old Castlehill," which were

described as in the deed of 15th August, 1808, and also several parcels of land not contained in that deed, and among others the sixth lot of the lands of Auld Castlehill. By a subsequent clause, the maker disponed to the said Thomas Frederick Fraser, "whom failing, to the other heirs and substitutes above "mentioned," the teinds of the lands conveyed, "And I hereby "recall, alter, and revoke the said deed of settlement and entail "last executed by me, and all and every deed or deeds of settle- "ment or entail, made, granted, or executed by me preceding "the date hereof, in so far as the same, or any of them, regards "or relates to the lands, houses, teinds and others above and "hereby disponed and conveyed, generally and particularly, "excepting the said disposition granted by me in favour of the "said Thomas Frederick Fraser, bearing date the "day of one thousand eight hundred and "years; which disposition last mentioned is not to be any ways "hurt or prejudiced by this deed, &c. declaring that the revoca- "tion or alteration of these presents is not to be inferred from "implication or construction, but to be proved by writing "only," &c,

On the 2d of July, 1812, Archibald Fraser executed another deed in these terms, — "Know all men, by these presents, me, "the Honourable Archibald Fraser of Lovat, — whereas I, "some years ago, executed a disposition and deed of entail or "tailzie of my lands and estate of Abertarff, and comprehending, "among other lands, the Old Glebe of Boleskine, in the united "parishes of Boleskine and Abertarff, and shire of Inverness, "and of my lands and estate in the parish of Inverness, and "shire aforesaid; and of certain other lands belonging to me, "which bears date the day of one thousand "eight hundred and years: And whereas, by the said "disposition and deed of tailzie or entail, there is full power and "liberty reserved to me to alter the same, in whole or in part,

" and even to revoke the same; and being, for just, good, and " onerous causes and considerations, resolved to exercise the said " faculty, in manner, and to the extent underwritten: There- " fore I have nominated and appointed, as I hereby nominate " and appoint, Thomas Frederick Fraser, my grandson, pre- " sently residing with his tutor, Doctor Bentley, of " the King's College, Aberdeen, and the heirs-male of his body, " to succeed to my said lands and estates, immediately after " myself, and the heirs of my own body; whom failing, to the " persons named as heirs and substitutes in the said deed of " entail, in the order therein mentioned: And I hereby dispone, " assign, and convey the said lands and estates, which are parti- " cularly specified and described in the said deed of tailzie, and " here held as repeated, for brevity's sake, to the heirs of my " own body; whom failing, to the said Thomas Frederick " Fraser, and the heirs-male of his body; whom failing, to the " other heirs and substitutes appointed or named by the said " deed of entail: But always with and under the several pro- " visions, conditions, burdens, limitations, restrictions, clauses " irritant and resolutive, specified and contained in the said deed " of tailzie, and which are here held as repeated, for brevity's " sake; and under these additional declarations, That the said " Thomas Frederick Fraser, and the heirs-male of his body " succeeding to the said lands, shall take and bear the name of " Archibald Fraser; and that he, the said Thomas Frederick " Fraser, and his foresaids, shall be bound to disencumber the " said lands, in the parish of Inverness, of the debts affecting the " same, out of my executry, or by burdening the other lands " above mentioned, or part of them therewith: And, in so far, " I alter the said deed of entail; reserving always full power and " liberty to me, not only to nominate and appoint such other " person or persons as I shall think fit to succeed to my said " lands and estates, failing the heirs herein named, and that by

" a writing under my hand at any time in my life; but also to " revoke, alter, and change the present nomination and deed at " my pleasure; declaring, however, that if these presents be not " revoked by me, the same shall be valid and effectual, though " found in my own custody, or in the custody of any other per- " son, undelivered at the time of my death."

Shortly after the death of Archibald Fraser, the maker of these deeds, which occurred in 1815, the appellant, Thomas Frederick Fraser, who had now assumed the name of Archibald Thomas Frederick, brought an action to have it found, " that the said " Honourable Colonel Archibald Fraser of Lovat, by all or " either of the dispositions above recited, executed by him upon " the second day of July, 1812 years, and the 2d day of August, " 1813 years, revoked, annulled, varied, and altered the trust- " disposition and settlement above mentioned, dated the 26th " day of July, 1811 years, in the whole articles, tenor and con- " tents thereof, and that the same was rendered totally unavail- " able to the persons and societies therein mentioned, or thereby " intended to be favoured in all respects;" and that the trustees and curators of the pursuer, " were entitled to hold, possess, and " enjoy the whole unentailed lands, houses, heritages, and heri- " table subjects belonging to the said Honourable Colonel " Archibald Fraser at the time of his death," and also his whole moveable estate.

At the same time the respondent, Lord Lovat, (then Thomas Alexander Fraser,) brought an action, narrating the deeds of 25th June, and 15th August, 1808; 2d July, 1812; 31st July, and 2d August, 1813; and concluding to have it found, that " the foresaid trust-disposition and conveyance, bearing date the " 25th day of June, 1808 years, and the aforesaid disposition " and deed of tailzie, bearing date the 15th day of August, 1808 " years, both said to have been executed by the said Honourable " Colonel Archibald Fraser of Lovat, were, in terms of the

" powers thereby reserved by him, revoked, and were not at " that time subsisting or effectual deeds, and that the aforesaid " trust-disposition and settlement executed by the said Honour- " able Colonel Archibald Fraser of Lovat, on the 26th day of " July, 1811 years, was a valid and subsisting deed, and that the " aforesaid deed, titled disposition and nomination, and said to " have been executed upon the 2d day of July, 1812 years, being " incomplete, and bearing reference to a deed not in existence, " was ineffectual, and of no avail, force, strength, or effect: As " also, that by virtue of the said trust-deed of the 26th day of " July, 1811 years, the pursuer, the said Thomas Alexander " Fraser of Lovat, was entitled, as chief of the clan Fraser, and " recognized as such by the said Honourable Colonel Archibald " Fraser, the maker of the said deeds, to succeed to the afore- " said Old Glebe of Boleskin and building thereon, and also to " the aforesaid parts and portions of the lands in Abertarff and " others particularly before described, or such parts thereof as " might remain unsold, after the other foresaid purposes of the " foresaid trust were answered, and that always under the desti- " nation, and subject to the conditions specified in said trust- " deed, but to the total exclusion of the said Archibald Thomas " Frederick Fraser, or his successors, who should be found to " have no right, title, or interest therein, and that the said " defenders, or one or other of them, ought and should be " decerned and ordained, by decreet foresaid, to make up titles " to the said property, and to grant, execute, and deliver to the " pursuer, and the heirs destined to succeed to him, valid and " sufficient dispositions and conveyances of the said heritable " property before mentioned, to which he, the said pursuer, was " entitled to succeed under the said trust-deed of 26th July, 1811 " years."

On the 6th February, and 27th of June, 1818, the Court " conjoined the said two processes, and in the process at the

" instance of the pursuer, the said Archibald Thomas Frederick " Fraser, and his curators and trustees: Find, that the deed of " 25th June, 1808, was a valid and subsisting deed to the effect " of conveying to the pursuer, the said Archibald Thomas " Frederick Fraser, the several tenements therein mentioned, " situated in the towns of Inverness and Campbelltown: Find, " that the deed of 13th June, 1812, was a valid and subsisting " deed, and did effectually convey to the said pursuer the lands " and barony of Old Castlehill, and the other lands and heri- " tages belonging to the disponer, and situated in the parish of " Inverness: Find, that the deed of 2d July, 1812, did bear an " intelligible and sufficient reference in the narrative thereof, to " the tailzie of 15th August, 1808, for the particular subjects " meant to be conveyed, viz., the lands of Abertarff, Old Glebe " of Boleskine, and the disponer's lands in the parish of Inver- " ness; and that the said deed of 2d July, 1812, was therefore a " sufficient and effectual conveyance to the said pursuer, of the " above mentioned several lands and subjects: Find, that the " deed of the 25th June, 1808, and the deed of 2d August, 1813, " were valid and subsisting, and effectual conveyances of all the " granter's personal and moveable estate and effects in favour of " the said pursuer and his curators and trustees: Find, that the " trust-deed of 26th July, 1811, was virtually revoked and " annulled by the said deeds of 2d July, 1812, and 2d of " August, 1813;" and after making these findings, decerned in terms of the conclusions of the appellant's summons, and in the respondent's action sustained the defences, and assoilzied. The appellant then charged Archibald Fraser's heir-of-line to enter, and thereupon raised action, and obtained decree of constitution against him, in implement of the decree of declarator. On the decree of constitution he charged the heir to enter in special, and then completed his title by adjudication.

The respondent now brought the action out of which this

appeal arose, and by his summons, after reciting the deeds of 15th August, 1808, of 26th June, 1811, of 2d July, 1812, and of 15th April, 1813, he concluded to have it found, "that all and haill "the foresaid parts and portions, both property and superiority, "of the said lands and estate of Abertarff and Boleskine, as par- "ticularly before described, contained in the said first recited "disposition and deed of tailzie, dated the 15th of August, 1808, "as also the foresaid first lot of the lands of Castlehill, and "parts of the fifth lot thereof, lying in the parish of Inverness, "likewise particularly before described, and contained in the "before recited disposition and deed of tailzie executed by the "said Honourable Archibald Fraser on the 15th of April, 1813, "must be taken up by the said Archibald Thomas Frederick "Fraser, as institute under the foresaid deeds of tailzie, or under "such other deed of tailzie as may yet be found necessary for "completing titles thereto; and can only be held by him under "the fetters of a strict entail, by virtue of the foresaid deeds of "tailzie already executed, or by virtue of such other deeds as "may be found necessary: And that, in case any new disposition "or tailzie of said lands and others is necessary, the same must "be conceived to and in favour of the said Archibald Thomas "Frederick Fraser and his heirs-male; whom failing, to the "pursuer and his heirs-male; whom failing, to such other heirs "and substitutes as shall be found to have right thereto; but "always with and under the burdens, conditions, provisions, "restrictions, limitations, prohibitions, exceptions, clauses irritant "and resolutive, contained in the two deeds of entail already "detailed, or such others as shall be settled by our said Lords, "and deemed necessary for effectually securing the possession of "the said estate to the pursuer, and whole subsequent heirs of "tailzie: And it being so found and declared, the said haill "defenders, or such of them whose concurrence is necessary, "should be decerned and ordained, by decreet foresaid, to "make, grant, execute, and deliver all dispositions or other

" deeds, if any, which may be found necessary for effectually " vesting the whole foresaid lands and other subjects in the " united parishes of Abertarff and Boleskine, and the first and " part of the fifth lot of Castlehill, in the parish of Inverness, in " the person of the said Archibald Thomas Frederick Fraser " and his heirs-male; whom failing, the pursuer, Thomas " Alexander Fraser and his heirs-male; whom failing, the other " heirs and substitutes entitled thereto under the fetters of strict " entail, and the conditions before mentioned: And the said " Archibald Thomas Frederick Fraser, and his curators or " trustees before named, ought and should be decerned and " ordained to make up and establish in his person, as the insti- " tute under the said deeds of tailzie already executed, or which " may be executed in the foresaid terms, complete, valid, and " sufficient titles to, containing the whole of the destination " before mentioned, and the whole burdens, obligations, condi- " tions, declarations, prohibitions, provisions, and clauses irritant " and resolutive before mentioned and referred to."

The appellant pleaded in defence to this action, — 1st, Want of title or interest in the pursuer; 2d, *Res judicata* in the previous actions; 3d, That an entail could not be created by reference, in the way and manner contended for; and at any rate no such entail had been made, or could be asked to be made, in the terms of the summons.

On the 24th June, 1823, the Court " sustained the defences, " and assoilzied the defenders from the whole conclusions of the " libel."

The respondent reclaimed, and on the 14th of May, 1824, the Court altered " the interlocutor reclaimed against, in so far as " regards the lands of Abertarff, together with the Old Glebe of " Abertarff or Boleskine, and find that the defender is bound " and obliged to execute an entail of these lands, in terms of the " entail executed by the late Honourable Archibald Fraser of " Lovat, dated 15th of August, 1808, containing a destination

" in terms of the deed executed by him on the 2d of July, 1812, " and decern, and remit to the Lord Ordinary to cause the same " to be prepared and executed accordingly, in common form; " and with respect to the lands of Auld Castlehill, find, that the " same belong to the defender in fee-simple, and decern and " declare accordingly; and, *quoad ultra*, refuse the desire of the " Petition, and adhere to the interlocutor reclaimed against."

The Lord Ordinary then remitted to Mr Aytoun, W.S. to prepare the draft of an entail, in terms of the Interlocutor of the Court.

Mr Aytoun, under this remit, prepared the draft of a deed, whereby the appellant was to convey to himself and the heirs-male of his body, " whom failing, to the other heirs and substi- " tutes appointed or named by the said deed of entail, bearing " date the 15th day of August, 1808, viz. the nearest legitimate " issue of Hugh, Lord Fraser of Lovat, namely, the said Thomas " Alexander Fraser, now of Lovat, therein designed of Strichen, " being the nearest lawful heir-male of the deceased Alexander " Fraser of Strichen," (the respondent) " and to the heirs- " male of the said Thomas Alexander Fraser," &c. " But " always with and under the several provisions," &c. " specified " and contained in the said deed of tailzie, 15th August, 1808, " and the foresaid disposition and nomination of 2d July, 1812, " and herein underwritten, which are all (with the exception of " the words herein inserted for extending the fetters against me, " the said Archibald Thomas Frederick Fraser, and the heirs- " male of my body, specially enumerated and contained in the " said disposition and deed of entail, dated 15th August, 1808, " namely." *

* The provisions and restrictions in the deed of August, 1808, in regard to selling, contracting debt, or altering the order of succession, were not given in the papers, farther than appears in the previous part of this report.

Objections having been put in by both parties to the draft prepared by Mr Aytoun, cases were ordered, and on advising these papers, the Court, on 6th June, 1839, "repelled the "objections of both parties to the report of Mr Aytoun, and to "that extent approved thereof, and remitted to the Lord Ordi- "nary to proceed accordingly."

Archibald Thomas Frederick Fraser appealed against the interlocutor of 14th May, 1824, except in so far as it found that the lands of Auld Castlehill belonged to him in fee-simple, and adhered to the interlocutor of 24th June, 1823, and also against the interlocutor of 6th June, 1839.

Lord Advocate and Sir William Follet, for appellant. I. It is *res judicata* by the judgment of February and June, 1818, in the conjoined actions between the same parties, that the appellant is entitled to enjoy the lands of Abertarff and Old Glebe of Boleskine, as absolute proprietor, whereas the result of the interlocutors appealed from, is to find that he is bound to hold these lands under the fetters of a strict entail.

II. The finding of the Court below is, that the appellant is bound to execute an entail of the lands. This must depend upon the intention of Archibald Fraser, to be ascertained according to the strictest modes of construction. The appellant is not a trustee, nor does he hold through trustees, who, of course, would be bound to act according to the intention of the truster, to be ascertained as best could be done; but he is direct disponee for his own benefit; any limitation of that benefit by reference to another deed than the conveyance, must be ascertained according to those strict rules of interpretation applied in the law of entails, Vere v. Hope, 10th July, 1837.

The reference in the deed of 2d July, 1812, has been held by the Court below to be to the deed of August, 1808, but there is

no authority for this, for, — 1st, The reference does not mention any deed by its date, and may be applicable as well to some other deed executed, but destroyed subsequently to the deed of 1812. — 2d, The reference is to a subsisting and operative deed, which was to be only so far altered; but the conveyance in the deed of 1808, of Abertarff, was altered by the conveyance in the deed of 26th July, 1811, which moreover expressly revoked all former conveyances, and it was superseded as to Castlehill by the deed of 30th June, 1812. — 3dly, The deed of 2d July, 1812, assumes, that the entail referred to by it was in favour of Archibald Fraser and the heirs of his body in the first place, as it professes to introduce the appellant and the heirs of his body, between Archibald Fraser and the heirs of his body, and the "heirs and substitutes in the said deed of entail;" but the deed of August, 1808, is not in favour of Archibald Fraser and the heirs of his body at all; and Thomas Alexander Fraser of Strichen, the respondent, is the institute under that deed, and in this respect is not an "heir and substitute," before whom the appellant could be brought in, inasmuch as the words heirs and substitutes cannot have application to an institute. — 4th, The description in the deed of 2d July, 1812, of the lands to be conveyed by it, shews that the deed of August, 1808, was not the one referred to, for, — (1st,) The deed of 1812 mentions, that by the deed referred to the granter had conveyed the Old Glebe of Boleskine, while the deed of 1808 conveys the Old Glebe of Abertarff, and makes no mention of Boleskine, the two being quite distinct subjects; (2d,) The deed of 2d July, 1812, speaks of the deed referred to by it as having conveyed the granter's lands in the parish of Inverness, and provides that the appellant shall disencumber the lands in the parish of Inverness of debt; but the deed of 30th June, 1812, shews this to be debt affecting lands which the granter had not acquired at the date of the deed of August, 1808, but on 28th December, 1808, 14th February,

1811, and 13th and 14th March, 1812; (3d,) The deed of 2d July, 1812, speaks of the deed referred to as having conveyed "certain other lands:" the deed of 25th June, 1808, shews, that the granter had been possessed of other lands; but the deed of August, 1808, if the deed referred to, does not contain a conveyance of any lands beyond Abertarff and Castlehill. Accordingly, the Court has found that the appellant is not bound to include within the entail which he has been ordered to make, either the lands within the parish of Inverness, the parts of Castlehill acquired subsequently to the deed of August, 1808, and those parts previously acquired and specially enumerated in that deed, or the other lands embraced under the words of the deed of 1812, "certain other lands."

III. If, then, the reference is not clear and explicit, it is not in the power of the Court to conjecture what may have been the intention of the party, and to order it to be made operative by the execution of a new deed; it was competent for the Court to declare the rights of the parties under the existing deeds, but it had no power to order the framing of a new deed to correct what was defective.

IV. But if the deed of August, 1808, be that referred to by the deed of 1812, the latter deed is to be registered as "a part "of the disposition and tailzie before mentioned;" the two, then, must be taken together, without alteration, as the entail framed by the entailer, and intended to operate; and in this respect also it was not competent for the Court below to order any other deed to be framed, compounded of parts of the two deeds, omitting others.

V. The deed of 2d July, 1812, in its destination supersedes that in the deed of August, 1808, on the supposition that the

deed of August, 1808, is that referred to by it, and after the granter and the heirs of his body, and the appellant and the heirs-male of his body, introduces the "heirs and substitutes in "the said deed of entail;" but the respondent, as before noticed, is neither an heir nor a substitute, but an institute, under the deed of August, 1808, and therefore he is no member of the destination under the deed of 1812, and has no interest to maintain the action, or enforce the interlocutor of 14th May, 1824.

VI. The effect of the deed of 1812, is in truth to make the appellant the institute. The fetters of the deed of 1808, in regard to the contraction of debt, if effectual for that purpose at all, and also in regard to altering the order of succession, are directed against "the heirs succeeding," which will not embrace the institute. But the deed prepared by Mr Aytoun repairs this defect, and makes the fetters bind the appellant, as well as the substitutes.

The several grounds taken by the appellant are so fully met by the opinion of Lord Cottenham at delivering judgment, that it is unnecessary to repeat the arguments used by the respondent in answer to them.

LORD COTTENHAM. — My Lords, the first question upon these appeals is, whether the appellant, Fraser, is entitled to the lands of Abertarff in fee, or whether they are subject to an entail with proper fetters, under which the respondent, Lord Lovat, will be entitled to succeed to them upon the death of the appellant, Fraser, without issue male? This question, when disencumbered of all irrevalent matters, does not appear to me to be one of much difficulty.

By a deed of tailzie and disposition of 1805, these lands were settled to and in favour of Archibald Fraser, the entailer, and the

heirs-male of his body ; whom failing, to such other heirs as he, or failing him, the heir-male of his body for the time, should name and appoint by writing ; whom failing, to and in favour of his heirs whatsoever.

The same Archibald Fraser, by a disposition and conveyance of 25th of June, 1808, settled certain property by name, (not including the lands of Abertarff,) "and all other lands and heri- "tages which belonged to, or might belong to him at the time "of his death, and which might not be otherwise settled and "disposed of by him," but subject to a distinct power, to revoke such settlement, and to sell, alienate, and dispone the lands as he should think fit.

This deed has been imported into the case by the appellant, who claims the property included in it, but as the power of revocation and new settlement was clearly executed, if the lands of Abertarff were included in it, it does not appear necessary farther to advert to this deed.

By a disposition and deed of entail and settlement of 15th of August, 1808, the same Archibald Fraser, describing himself as heritable proprietor of the lands after described, disponed in favour of the respondent Lord Lovat, by his then name of Thomas Alexander Fraser, and his heirs-male, the said lands of Abertarff, and others, described as standing in his person in fee-simple through the failure of heirs of his body. This settlement contained all the proper clauses and provisions of a regular entail, but it also contained a clause of revocation.

The same Archibald Fraser, by a trust-disposition and settlement, dated the 26th July, 1811, disponed to and in favour of certain trustees, all and whole the following parts and portions of lands in Abertarff, but excepting all lands and heritages not therein specifically disponed, which might be contained in any deed of entail, or other settlements executed by him, and which should remain unrevoked at the time of his death. The trusts were to raise certain sums of money, and after the performance of such

trusts, the Trustees were directed to make a valid disposition, and deed of entail, with proper clauses of the said estate of Abertarff, and of the whole unentailed property belonging to him, to and upon the nearest legitimate male issue of his ancestor, Hugh Lord Fraser of Lovat, namely, the nearest lawful heir-male of the deceased Alexander Fraser, and his heirs-male, which describes the respondent, Lord Lovat. This deed also contained a power of revocation, which was afterwards exercised.

The whole question turns upon the next deed, and before its provisions are considered, it is material distinctly to understand, how these lands of Abertarff stood settled by the preceding deeds. By the deed of 1805, they were settled to and in favour of Archibald Fraser, the entailer, and the heirs-male of his body; whom failing, to such other heirs as he should appoint. By the deed of 1808, he takes notice that there was a failure of heirs of his body, but as this, during the whole of his life, must, in law at least, be considered as uncertain, there was no intention, if there had been the power, of interfering with the estates and interests of such heirs-male of his body, if any such should be born; but the object was to substitute other heirs in the expected event of a failure of such heirs-male of his body; and for this purpose, the lands, that is, all such estate and interest in the lands as belonged to him, or over which he had the power of disposition, in the event of the failure of heirs-male of his body, were disponed to and in favour of the respondent, Lord Lovat, and his heirs-male, and the respondent is accordingly, in the deed of 1812, described as a substitute.

The result of these two deeds of 1805 and 1808 was, that the lands of Abertarff stood settled upon the entailer, Archibald Fraser, and the heirs-male of his body; whom failing, upon the respondent, Lord Lovat, and his heirs-male.

That this was the entailer's view of the manner in which the lands were settled, is proved by the language and provisions of the deed of the 2d of July, 1812, now to be considered, and under

which the appellant claims; for it states his object to be, that the appellant, and the heirs-male of his body, should succeed to the lands immediately after himself, and the heirs of his body. But as, by the deed of 1805, heirs-male of his body only were named, if he intended to include daughters, it was necessary to make a new disposition; and accordingly, by this deed of 1812, the disposition is to the heirs of his own body; whom failing, to the appellant, and the heirs-male of his body; whom failing, to the other heirs and substitutes appointed and named by the said deed of entail; but subject to the several clauses and provisions contained in the deed of entail, which, it is admitted, were effectual for the purpose of preventing the alienation of the property, if the deed referred to was the deed of 1808, and if the appellant was to be included in the fetters.

Now, although the deed of 1812, in referring to a deed of entail or tailzie of the lands at Abertarff, executed by Archibald Fraser "some years ago," does not mention the date, but has blanks in the places appropriated for it, yet it correctly describes the property comprised in the deed of 1808. It states, that there was a power of revocation in the deed referred to, which there was in the deed of 1808. It assumes, that the appellant was not included in the deed referred to, and he was not in the deed of 1808. And above all, the deed of 1808 is the only deed of tailzie of these lands forthcoming, or of which there is any trace, and the trust-disposition of the 26th of July, 1811, proves that at that time, these lands were subject to the entail of 1808, so that if there had been any other deed of entail, it must have been executed between the 26th of July, 1811, and the 2d of July, 1812, which would be utterly inconsistent with the description, in the latter deed, of the entail referred to, as it recites that the disposition or deed of entail referred to had been executed some years ago.

I think it therefore quite clear, upon the instruments themselves, that the entail of 1808 is the deed referred to in the deed

of 1812, and so the appellant himself contended, and succeeded in a contest with the heir of line in obtaining a judgment of the Court, dated 5th of February, 1818, not now in question, by which it was declared, that the deed of the 2d of July, 1812, bears an intelligible and sufficient reference in the narrative thereof to the deed of tailzie of 15th August, 1808, for the particular subjects meant to be conveyed, with the lands of Abertarff, and Glebe of Boleskine, &c, and that the said deed of 1812 is therefore a sufficient and effectual conveyance to the pursuer, the appellant, of the above mentioned several lands and subjects. And it was also found, that the trust-deed of 1811 was effectually revoked and annulled by the subsequent deeds of 1812 and 1813. The appellant, indeed, now insists that this is an adjudication in his favour; but it is obvious, that the present question was not in issue, and that the judgment of 1818 only concluded the title of the heir of line, leaving open the claim of all parties under the deeds of 1808 and 1812.

If, then, the deed of 1808 was the entail referred to by the deed of 1812, can there be a doubt that the whole of the entail to be created by the latter deed is to be guarded by the provisions and fetters specified in the former? or, in other words, that the appellant is to hold the estate under the deed of 1812, to him and the heirs-male of his body, with and under the several provisions, conditions, burdens, limitations, restrictions, clauses irritant and resolutive, specified and contained in the deed of tailzie referred to, which were to be held as there "repeated for bre-"vity's sake, and under these additional declarations that the said "Thomas Frederick Fraser," the appellant, &c, and then follow certain restrictions applicable only to the appellant, and his heirs-male of his body, and the entailer then says, "and in so far I alter the said deed of entail."

The deed of 1811 being revoked, the deed of 1808 was in force, and by that deed all the entail thereby created was suffi-

ciently fenced and protected. But the appellant, and the heirs-male of his body, being introduced into the entail by the deed of 1812, it was necessary to impose the fetters upon them also, which the deed of 1812 clearly does. If the appellant, and his heirs-male of his body, were not to be affected by the fetters of the deed of 1808, how are the expressions "and under these additional "restrictions" to be construed, as to which he is expressly named? The appellant would make the fetters mentioned in the deed of 1812 apply to those who were already fettered by the deed of 1808, and not to himself and the heirs-male of his body, who, but for the provisions of the deed of 1812 referring to that of 1808, would not be fettered at all. The result of which would be, that the deed of 1812 would utterly destroy the entail of 1808, although the entailer in the former deed says, that he intended to alter it "in so far" only.

The interlocutor does not impose fetters by implication, but merely puts an obvious construction upon the deed of 1812. What gave rise to the first decision in 1823 upon this point, or to the doubts afterwards suggested, is not very obvious. I entertain no doubt whatever of the propriety of the ultimate decision upon this point, which is the subject of appeal.

The appellant then objects that the interlocutor appealed from is erroneous, assuming this to be the proper construction of the deeds, because it does not treat the entail as complete by these deeds, but compels the appellant to perfect it. If there were any foundation for this objection, it would not affect the question of right, but only the means of giving effect to it. If the appellant had rightfully become possessed of an unfettered title, there might be much strength in the objection; but if the deed of 1812 did refer to the deed of 1808, and the deed of 1812 included the respondent in the destination, and the appellant in the fetters, the appellant ought not to have been possessed of an unfettered title; and if he has invested himself with one, it must be within the

power, as it was clearly the duty, of the Court to correct this error for the purpose of securing the right of the parties entitled.

But this, it was said, could only be done by first reducing the title so imperfectly obtained. The interlocutor appealed from effects that object by directing the appellant so to deal with the title he obtained as to secure the rights declared to belong to the respondent. The appellant has not succeeded in shewing that there was any irregularity in this mode of effecting the object. The objection does not appear to have been raised below. In the note of the judgment, on the 6th of June, 1839, there is no allusion to this point. Lord Fullerton, though he differed from the other three Judges, and thought that the fetters did not apply to the appellant, did not suggest this as one of his difficulties. I cannot think that your Lordships will, upon this question of form, have any disposition to differ from the judgment appealed from. This objection is strangely urged by the appellant, who contends, that he is entitled, under the deed of 1812, to the lands of Abertarff in fee.

The appellant again contends, that the respondent cannot be considered as included in the description in the deed of 1812, because he is an institute, and not a substitute, in the deed of 1808. I have already observed, that, taking the entail as created by the deeds of 1805 and 1808 together, he is a substitute, being called upon failure only of the heirs of the body of the entailer, and it cannot be doubted but that he is intended in the description of the parties in the deed of 1812. What, however, removes all doubt upon this subject is, that the expressions "heirs "and substitutes" in the deed of 1812, are precisely the same as are used in the deed of 1808, in which it is quite clear, that the respondent is included.

I am, for these reasons, of opinion, that the appellant, Archibald Thomas Frederick Fraser, has failed in establishing any error in the interlocutor appealed against and that his appeal must be dismissed.

I am always unwilling to admit exceptions to the very wholesome practice of making an unsuccessful appellant pay the costs of the appeal; but in this case, the Court of Session decided for the appellant in 1823, and for the respondent in 1824, and in 1839 the Court was not unanimous upon the construction of their own decree of 1824. Under such circumstances, it could not be expected that the appellant should acquiesce in the final judgment. The expenses of the subsequent litigation are not to be attributed to him. I think, therefore, that the original appeal must be dismissed without costs.

Ordered and Adjudged, That the interlocutors, so far as complained of in the original appeal, be affirmed. And it is farther Ordered and Adjudged, that the interlocutors of the 24th of June, 1823, so far as complained of in the cross appeal, be reversed. And it is also farther Ordered and Adjudged, that the interlocutors of the 14th of May 1824, complained of in the said cross appeal, be altered, by inserting therein, after the word "Boleskine," the following words, viz. "and so "much of the lands of Auld Castle-Hill as are claimed by the sum-"mons, and described therein as the first lot of Castle-Hill," and by omitting therefrom the following words,—"and with respect to the "lands of Auld Castle-Hill find, that the same belong to the said de-"fender in fee-simple, and decern and declare accordingly, and *quoad* "*ultra* refuse the desire of the petition, and adhere to the interlo-"cutor reclaimed against." And it is also farther Ordered, that the cause be remitted back to the Court of Session, with directions to proceed with the farther settlement of a draft of a deed, to be executed by the said Archibald Thomas Frederick Fraser, respondent, in the said cross appeal, in conformity with the alterations herein ordered to be made, and to do otherwise in the said cause as shall be just and consistent with the judgment.

RICHARDSON and CONNELL — GEORGE WEBSTER, Agent.

[1st March, 1842.]

JAMES RENTON, Appellant.

ROBERT ANSTRUTHER, Esq. PHILIP ANSTRUTHER, Esq. and Dame SARAH ANSTRUTHER, Respondents.

Tailzie Titles. — Whether a party having a mere personal right to lands can validly make a procuratory of resignation as the basis of an entail. — *Query.*

IN the year 1806, Catharine Anstruther purchased from the Marquis of Titchfield the lands of Thirdpart, with money received from her brother, Sir Alexander Anstruther, then in India, and also with money advanced from her own funds; and obtained a conveyance to herself, which contained an assignation in these terms: — "As also we do hereby assign and dispone to "the said Catharine Anstruther and her foresaids, the whole "writts, evidents, rights, title-deeds and securities, both old and "new, and as well legal as conventional, granted and conceived "in favour of us and our ancestors and authors, of and concern-"ing the lands, teinds and others before disponed, with the "pertinents of the same, together with the procuratories of "resignation, precepts of sasine, clauses of warrandice, obliga-"tions for making writs furthcoming, and whole other oblige-"ments and clauses therein contained, and all action and "execution which have been, or may be, brought or used "thereupon."

Catharine Anstruther was infeft on the precept in this conveyance. On 5th March, 1808, she executed a disposition, which proceeded on this narrative: — "Considering that I some "time ago purchased from the Most Honourable the Marquis "and Marchioness of Titchfield, the lands and barony of

" Caiplie, comprehending the lands of Overtown of Caiplie, " called Thirdpart, and others hereinafter mentioned, in trust " and for behoof of Alexander Anstruther, Esq. Attorney- " General to the Honourable the East India Company at " Madras, my brother, the price whereof, excepting " of principal and interest from the has " already been paid, partly from sums belonging to my said " brother, and partly from money borrowed or advanced by me " on his account, and the said Alexander Anstruther being now " desirous that I should convey over to him the said purchase, on " his relieving me of the sums borrowed or advanced by me as " above mentioned, and also of that part of the price still " remaining unpaid; therefore I, the said Catharine Anstruther, " do hereby sell, alienate and dispone from me, my heirs and " successors, to and in favour of the said Alexander Anstruther, " and his heirs whomsoever, and disponees, heritably and irre- " deemably, All and Whole the lands and barony of Caiplie, " comprehending the lands and others after mentioned." After describing the lands the disposition contained an obligation to infeft " the said Alexander Anstruther and his aforesaid," by a double manner of holding; procuratory to resign for new infeft- ment in favour of " the said Alexander Anstruther and his " aforesaid;" warrandice against fact and deed; a precept for infefting " the said Alexander Anstruther or his aforesaid;" and a clause of assignation in these terms: — " As also, I do hereby " assign and make over to the said Alexander Anstruther and " his foresaids, the rents, maills, profits and duties due, payable " and prestable for and forth of the lands, teinds and others " above disponed, by the tenants and possessors thereof, for the " crops and years 1805 and 1806, so far as unuplifted, and for all " years and crops thereafter to come, with the tacks of the fore- " said lands, and whole clauses therein, and execution competent " thereon, and I do also hereby assign and dispone to the said

" Alexander Anstruther and his foresaids, the whole writs, " evidents, rights, title-deeds and securities, both old and new, " and as well legal as conventional, granted and conceived in " favour of me and my ancestors and authors, of and concerning " the lands, teinds and others before disponed, with the perti- " nents of the same, together with the procuratories of resigna- " tion, precepts of sasine, clauses of warrandice, obligations for " making writs furthcoming, and whole other obligements and " clauses therein contained, and all action and execution which " have been, or may be, brought or used thereupon, which " assignation of the rents, maills and duties, and disposition of " the writs, I bind and oblige me and my foresaids to warrant " from my own proper acts and deeds only."

On the 22d September, 1808, Sir Alexander Cochrane executed a deed of settlement of the lands of Thirdpart, according to a special destination.

On the 18th January, 1810, while the procuratory and precept in Catharine's disposition were yet unexecuted, Sir Alexander Cochrane executed a procuratory of resignation, for the purpose of creating an entail of the lands. This deed contained this narrative: — " I, Alexander Anstruther, Esq. &c. considering " that Miss Catharine Anstruther, my sister, some time ago " purchased in my behalf, and for my use, the lands and estate " of Caiplie, and others after described, lying in the parishes of " Kilrenny and Crail, and county of Fife, the right and title to " which was taken and conceived in her favour, and still stands " vested in her person for my use; and that I having resolved, " for certain good causes and considerations, to execute a deed " of entail of the said estate, it is necessary that the said Catharine " Anstruther, as standing nominally vested in the right thereof, " should concur with me in granting said deed, and which she " has signified her readiness to do in manner underwritten: " Therefore witt ye me, with consent of the said Catharine

" Anstruther, and I the said Catharine Anstruther, as having " right in manner foresaid, and for fulfilling the intentions of " my brother, and we both, as in the right of the premises, to " be bound and obliged, as we hereby bind and oblige us and " the heirs of tailzie and provision after specified, without the " benefit of discussing them in order, and all others our successors " whomsoever, to infeft me the said Alexander Anstruther, " myself, and the said heirs after mentioned, in the said lands " and estate of Caiplie and others, lying and described in " manner particularly after specified, to be holden either of us " and our foresaids, or from us, of and under our superiors " thereof, as freely as we hold the same ourselves, and that either " by resignation or confirmation, or both, the one without " prejudice of the other; but always with and under the condi- " tions, provisions, clauses irritant and resolutive, declarations " and reservations underwritten; and for accomplishing the said " infeftment by resignation, we hereby constitute and appoint "

" and each of them, jointly and " severally, our lawful and irrevocable procurators, giving, " granting, and committing to them full power and commission " for us, and in our name and behalf, duly and lawfully to " resign and surrender, as we do hereby resign, surrender, " upgive, overgive and deliver, All and Sundry the lands and " estate after mentioned, viz. [here follows the description of the " lands,] as the said whole lands may be otherways or more " fully described in the rights and infeftments thereof, in the " hands of our respective immediate lawful superiors, or their " commissioners, in their name, having power to receive resigna- " tions and to grant new infeftment, in favour and for new " infeftment of the same to be made, given and granted to me, " the said Alexander Anstruther, and the heirs of my body, " whom failing, to the heirs of the body of the deceased

" Brigadier-General Robert Anstruther, my brother; whom " failing, to the said Miss Catharine Anstruther, my eldest " sister, and the heirs of her body; whom failing, to Mrs Eliza- " beth Anstruther, otherways Campbell, my youngest sister, " widow of the deceased Lieutenant-Colonel Colin Campbell, " younger of Stonefield, and the heirs of her body; whom " failing, to the other persons called and entitled to succeed to " the estate of Balcaskie, under and by virtue of a deed of " entail of that estate, executed by Sir Robert Anstruther of " Balcaskie, baronet, my father, in the order therein set down " and expressed; whom all failing, to my own nearest heirs " whomsoever, and assignees, heritably and irredeemably; but " always with and under the burden of a free yearly annuity of " L.1000 sterling to Mrs Sarah Anstruther, my wife, in case she " survives me;" and other provisions not necessary to be noticed. After imposing the fetters of a strict entail, the deed proceeded in these terms: — " And we, the said Alexander " Anstruther and Catharine Anstruther, do hereby jointly and " severally assign and dispone to me, the said Alexander " Anstruther, and my said heirs of entail, whom failing, to my " other heirs as aforesaid, under the conditions, provisions, " declarations, and clauses irritant and resolutive herein con- " tained, all and sundry writs, evidents, rights, title-deeds and " securities whatever, both old and new, made, granted, and " conceived in favour of us and our ancestors and authors, of or " in relation to the said lands and others before assigned, " reserving nevertheless full power and liberty to me the said " Alexander Anstruther by myself alone at any time of my life, " *etiam in articulo mortis*, without consent of any of the heirs of " entail or heirs whomsoever before mentioned, by any writing " under my hand to alter, innovate, or revoke these presents in " whole or in part, as I shall think proper, but declaring if the " same shall not be altered or revoked by me, or if I shall not

" otherways settle the said lands and estate by any deed con-
" trary hereto, it is my intention, and it is hereby expressly
" provided and declared that these presents shall stand good
" and continue effectual and obligatory, not only as to all the
" lands and others foresaid, whereto a sufficient title shall be
" made up and completed in my person before my decease, but
" also to compel my heirs-at-law and other heirs to make up
" and complete titles in their persons to any part of the said
" lands and others to which I shall not have completed my own
" titles, and then to resign the same in the hands of the
" respective superiors thereof in favour of the heirs of tailzie
" herein before specified, with and under the whole conditions,
" provisions, clauses irritant and resolutive, and reservations
" before written: As also, although I shall hereafter take any
" of the rights and infeftments of the said lands and others
" before resigned, to and in favour of any other heirs than those
" of entail before written, yet it is hereby nevertheless provided
" and declared that these presents shall be effectual against such
" other heirs, unless it shall be expressly declared in the said
" rights that my intention is thereby, in so far, to alter this pre-
" sent right and settlement; and although these presents shall
" be found lying in my own custody, or in the custody of any
" other person, and no farther executed at my death than it is
" at present, yet I hereby declare that the same shall be equally
" good and effectual to all intents and purposes, as if the same
" had been duly recorded in the Register of Taillies, and fully
" completed by infeftment before my death." Here then fol-
lowed the necessary clauses for registration of the deed, and a precept for infeftment, which set out in these terms. " And
" lastly, we," &c.

Although this deed bore to be made with consent of Catharine Anstruther, she never adopted, or in any way adhibited her consent to it.

On the 19th January 1814, Sir Alexander Anstruther executed another deed, which contained this narrative, — "I, Sir "Alexander Anstruther," &c. "considering that Miss Catharine "Anstruther, my sister, some years ago purchased, in my behalf "and for my use, the lands and estate of Caiplie and Thirdpart, "and Barnes and others, lying in the parish of Kilrenny and "Crail, and county of Fife, the right and title to which was "taken and conceived in her favour and in her name, but for "my use, of all which lands and estate I afterwards executed a "deed of entail, with and under certain conditions, provisions, "and reservations, and with and under the burden," — [Here followed an enumeration of the provisions granted by the deed of 1810,] and a recital of the power of alteration reserved by that deed, — "and I, the said Sir Alexander Anstruther, having "resolved, and intending to alter the aforesaid deed of entail, "and will or deed of settlement in the particulars hereinafter "mentioned: Therefore, wit ye me, that I, the said Sir Alex-"ander Anstruther, do hereby alter, innovate, and in part "revoke the said deed of entail, and the said will or deed of "settlement, so far as," — [Here followed various alterations on the provisions in the deed of 1810.] — "And I hereby farther "innovate, alter, and in part revoke the said deed of entail, in "so far as relates to the persons to be called and entitled to "succeed to my said lands and estate, as heirs of entail, by "declaring and appointing, as I do hereby expressly declare "and appoint, that after my death, my said lands and estate "shall descend to my eldest son and heir, Robert Anstruther, "and the heirs of his body; whom failing, to my second son, "Philip Anstruther, and the heirs of his body; whom failing, "to my third son, Thomas Andrew Anstruther, and the heirs "of his body; whom failing, to my fourth son, George Buchan "Anstruther, and the heirs of his body; whom failing, to every "other son to be born to me of my present or any future mar-

" riage successively, according to their priority of birth, and to " the heirs of the body of each son successively; whom failing, " to my daughter Janet Catharine Anstruther, and the heirs of " her body; whom failing, to my daughter Louisa Ann " Anstruther, and the heirs of her body; whom failing, to each " and every other daughter to be born to me of my present or " any future marriage successively, according to priority of birth, " and to the heirs of the body of each and every such daughter; " whom failing, to the heirs of the body of my late brother, " General Robert Anstruther; whom failing, to my sister, " Catharine Anstruther, and the heirs of her body; whom " failing, to my sister, Elizabeth Anstruther, *alias* Campbell, and " the heirs of her body; whom failing, to my uncle, Colonel " John Anstruther Thomson, of Charlton, and the heirs of his " body; whom failing, to Sir Thomas Andrew Strange, Knight, " Chief Justice of Madras, and the heirs of his body; whom " failing, to the other persons called and entitled to succeed to " the estate of Balcaskie, under and by virtue of any deed of " entail which may have been made, or may hereafter be made, " of the said estate of Balcaskie by Sir Robert Anstruther, of " Balcaskie, Baronet, my father, in the order therein set down " and expressed as heirs of entail, under the said deed of entail " by me executed as aforesaid, and with and subject to all the " reservations, limitations, conditions, restrictions, powers and " clauses in the last-mentioned deed of entail so by me executed " contained; and I also hereby direct and appoint, that so soon " after my death as conveniently may be, upon the demand of " the tutrix and curatrix, or tutors and curators of my children, " or of any of them, the person or persons in whose name or " names the said lands and estate may then stand vested, may " execute all necessary surrenders, resignations and other deeds " and acts in law, and to and in the names of such persons as " may be proper for the purposes herein before stated; and I

" hereby declare, that the aforesaid deed of entail, and also the " aforesaid will or deed of settlement, bearing date the 22d day " of September 1808 years, in so far as the same are not altered " by these presents, shall still, *quoad ultra*, remain in full force " and virtue, hereby revoking all other dispositions of any part " of my property by me, at any other time, either before or " afterwards, up to this time made or executed, and I reserve " full power and liberty to myself, at any time of my life, and " even upon death-bed, to alter, innovate or revoke these pre- " sents, in whole or in part: But declaring that if I shall not " think proper so to do by a writing under my hand, these pre- " sents shall be valid and effectual, although found in my cus- " tody, or that of any other person, and undelivered at my " death, with the delivery whereof I have dispensed, and hereby " dispense for ever, consenting to the registration, &c.

The deeds before stated to have been made by Sir Alexander Anstruther, were executed by him while in India. In 1819 he left India for this country, but died on his passage.

At this time his eldest son Robert was a minor. In 1822, while Robert was yet in minority, the deeds of 1810 and 1814 were recorded in the register of entails, under a warrant obtained upon a petition presented in his name. On the 5th November 1822, he was served heir of line and of tailzie and provision to his father upon a claim which set out these two deeds; and on the 3d February 1823, a crown charter of resignation and confirmation, was expede in his favour, and of the parties called to the succession by the deed of 1814, under the limitations contained in the deed of 1810. This charter confirmed the original disposition to Catharine Anstruther, and proceeded upon a resignation made in virtue of the procuratory in her conveyance to Sir Alexander, of March 1808—" in favorem proque novo " infeofamento præmissorum faciend. dand. et concedend. dicto " Roberto Anstruther hæredibusque ex ejus corpore quibus " deficien. aliis hæredibus talliæ et provisionis supra script.

" secund. ordinem et cursum successionis antea mentionat." On 14th June 1823, infeftment was expede upon this charter: at this time Robert Anstruther was still in minority.

After he came of age he procured himself to be enrolled as a freeholder, in respect of his infeftment in the lands contained in the charter; he took the benefit of the act 10 Geo. III. for the improvement of entailed estates; and at different times he granted bonds of annuity, and other securities, over the lands in which the entail of 1810 was mentioned, and the effect of it preserved.

On the 17th October 1829, Robert Anstruther conveyed the lands to Maconochie and Paul in trust, to receive the rents and apply them in payment of his debts, and of the annuities secured upon the lands. This conveyance set forth the entail, and contained clauses for preserving its effect.

Afterwards he borrowed money to redeem these annuities, and Maconochie and Paul conveyed the lands to Renton in trust, by a deed which likewise recognized the entail.

On the 1st April 1836, Robert Anstruther accepted a bill for £183, 19s. 3d. drawn upon him by Renton, payable one day after date, and on the same day he gave him his promissory note for £1000, payable at the same time. As a creditor upon these documents, Renton brought action for adjudication of the entailed lands, but apprehending a difficulty of success in that action, by reason of the state of the titles, he brought an action of declarator and reduction, concluding to have it declared that no valid entail had ever been made, and that the lands were liable to be adjudged, as if the deeds of 1810 and 1814 had never been executed, or at least that no feudal title had been made up under the entail, nor the entail made real by infeftment, and in case it should be necessary, the title standing in the person of Robert Anstruther, should be reduced and set aside. The reason on which this conclusion for reduction was founded was, " the said pretended charter, and the pretended resignation on

" which the same followed, and the infeftment taken thereon, " were without any legal or sufficient warrant, the same having " proceeded upon a procuratory of resignation, which gave no " warrant for any such charter and infeftment, or for any resig- " nation being made in favour of the parties in whose favour " they were granted and executed, or for the limitations, restric- " tions, and qualifications therein contained, and they are other- " wise irregular and inept." This action was directed solely against Robert Anstruther.

Dame Sarah Anstruther, the widow of Sir Alexander, and Philip his second son, obtained leave to sist themselves as parties, and they and Robert put in separate defences. Dame Sarah, and Philip Anstruther pleaded in defence, 1st, All the proper parties have not been called. 2d, The pursuer cannot maintain this action consistently with his own titles, character, and duty as trustee. 3d, The pursuer cannot maintain this action, because he is not a *bona fide* creditor of Robert Anstruther, but on the contrary, is acting in concert and collusion with him. 4th, The action is groundless on the merits, because Sir Alexander had a sufficient title in him to make the entail, and the titles have been effectually completed. 5th, The titles of Robert were completed under the entail before the pursuer became his creditor. The record was closed upon these pleadings.

The Lord Ordinary (Cunninghame) repelled the first defence, and ordered cases by the parties, and upon advising them, ordered them to be boxed to the Court, subjoining to his interlocutor the following note.

" *Note.* — In considering this case the Lord Ordinary has all the " inclination and leaning which the law has so often manifested to " liberate the proprietor in possession from the fetters of the entail, " if it has not been executed in a manner duly consistent with the " strictest rules of law and form. But, on the other hand, the Court

" must take care that no plea is sustained, in order to effect this, " which will put to hazard or unsettle any rules long understood by " parties and men of business as fixed in the law of title, and on " which innumerable parties and their families depend for the secu- " rity of their property. The Lord Ordinary entertains no ordinary " apprehensions that there is a risk of this from some of the pleas of " the pursuer. His views will be best understood from adverting to " the pleas of the pursuer in their order.

" I. It is said, that when Sir Alexander Anstruther executed the " first of the two deeds now in question in 1810, he was not *in titulo* " to grant any procuratory of resignation, as he was not infeft, and " did not validly assign the procuratory to which he then had right " in his sister's disposition of 1808.

" Now, as to this deed of 1810, though it certainly runs in the " name both of Sir Alexander and his sister, and was intended to be " executed by both, yet, as Miss Anstruther never signed it, it can " only be held as the deed of Sir Alexander alone. This the pur- " suer seems to admit. Nevertheless, *utile per inutile non vitiatur.* " The procuratory, as the deed of Sir Alexander, is not inept, because " the consent of a party was not adhibited, whose consent was not " necessary.

" Viewing this, then, as a procuratory of resignation by Sir Alex- " ander alone, was it in any respect ineffectual? He then had an " unquestionable personal right to the lands. He held the disposi- " tion of his sister, who had been infeft, setting forth, that the lands " had been acquired with his money, and therefore she disponed the " lands to him with procuratory and precept. He clearly, therefore, " had the right either to use Miss Anstruther's procuratory himself, " or to assign it to others, to be used under any conditions and limi- " tations that he thought fit. For example, he could have assigned " it to as many parties successively, in liferent, as he thought fit, and " to others thereafter in fee.

" If he could do this, there seems to have been nothing to prevent " him from transferring the procuratory to heirs and substitutes, " under the conditions and restrictions of an entail. The precedent

" of Napier and Livingstone, quoted in the defender's case, is suffi-
" cient to shew that it was decided both by this Court and the House
" of Lords, as an incontestable point, that a tailzie by a party holding
" only a personal right to lands is effectual. The question therefore
" is, if Sir Alexander Anstruther made his entail in the valid and
" effectual form which the state of his own title at the time required?

" Now, while the deed of 1810 was, in fact, a procuratory of resig-
" nation flowing from Sir Alexander himself, it contained also the
" usual general assignation of ' all and sundry writs, evidents, rights,
" ' title-deeds and securities, whatever, both old and new, made and
" ' conceived in favour of us,' &c. and the first, and indeed the main
" question raised by the pursuer is, whether Sir Alexander can be
" held under the general assignation of writs and evidents in the
" deed of 1810, to have validly assigned to the heirs and substitutes
" of tailzie the unexecuted procuratory in Miss Anstruther's disposi-
" tion of 1808? If this is decided affirmatively, much of the diffi-
" culty supposed to occur in these titles must disappear.

" The pursuers' argument on this head is founded, in a great
" measure, on the case of Graham of Gartmore and Don in 1815, in
" which it was found that the general assignation of writs and evi-
" dents, in a conveyance of lands and teinds, did not import the
" transference of a tack of teinds, to which the disponee had right at
" the date of the conveyance.

" But the Lord Ordinary views that as an entirely different ques-
" tion from the present. In fact, it is applicable to very few cases,
" except, perhaps, in questions of teinds, which are some time pos-
" sessed by parties under various peculiar rights very different from
" each other. In Graham's case, for example, the question came to
" be, whether it ought to be held, that when a proprietor made an
" entail of the fee of his lands and teinds, and assigned all writs and
" evidents in regard to these subjects, he could be held to have also
" entailed a tack of teinds held by him at the date of the tailzie?
' The Court, keeping in view the difference between rights of pro-
" perty and tacks, found that such a construction could not be put
" on the general assignation of writs and evidents in the estate of

" Finlayston. The import and extent of that decision was well ex-
" plained by Lord Glenlee in a late case, Hamilton v. Montgomery,
" 12 *Shaw*, 353, in which he said, — ' The Court held, that though
" ' the right in question was a tack of teinds which may be carried
" ' by assignation, yet the assignation to writs could only be used to
" ' support the right actually conveyed, but could not convey the
" ' tack itself.'

" This view of the ground of decision in Graham's case is also
" borne out by the argument of the successful party, as recorded in
" the Faculty Collection. ' The clause,' said he, ' assigning the
" ' writs and evidents, never had the force ascribed to it by the
" ' pursuer. It has been introduced merely in subserviency to the
" ' purposes of the disposition, and to carry to the disponee the par-
" ' ticular documents by which the rights conveyed may be com-
" ' pletely feudalized.'

" Now, apply these views to this case. The radical and actual
" right granted by Sir Alexander Anstruther in 1810 was a procura-
" tory of resignation. He must be presumed to have known that he
" could only grant such a procuratory as the holder and assignee of
" the procuratory of a previous proprietor feudally infeft, and there-
" fore it cannot be questioned in this particular case, that the assigna-
" tion of writs and evidents must be held to include and carry that
" prior procuratory under which alone he could give any operative
" or practical effect to the right which he then granted? It is
" thought the present case falls directly within the illustration put
" by the defender in Graham's case, of the instances in which the
" general assignation receives effect.

" The Lord Ordinary must own that he should consider the case
" of Graham as a precedent of most extensive and alarming applica-
" tion in practice, if it were held to rule such a case as the present.
" Perhaps there is no class of rights understood more universally to
" fall within general assignation of writs and evidents, than procura-
" tories of resignation. Many thousand charters have been passed,
" and are in daily progress on procuratories taken up under the
" general assignation clause, without any specific reference; and if

" this practice is now to be unsettled, or even if any doubt is to be " cast on titles and progresses so completed, the consequences cannot " be foreseen.

" But in what does the present case differ from those of most ordi- " nary occurrence? It is said that there was no conveyance of the " lands themselves here, but that the entail was in the form of a " procuratory by a party uninfeft. The entailer, however, gave no " disposition, because he was not infeft himself. Looking to the " state of his title if he had given a conveyance, the only clauses of " it which could have been feudally acted on, would have been the " procuratory and resignation of writs. But at present it is not very " easy to see on what principle effect can be refused to the deed of " 1810, which contains these clauses *per se*, in a separate deed.

" II. The next plea raised by the pursuer is, that the deed of " alteration executed by Sir Alexander Anstruther in 1814 was a " new entail, and that there was no assignation, general or special, of " Miss Anstruther's procuratory of resignation, at least in that last " deed. At present, however, the Lord Ordinary does not think " that this plea is maintainable.

" It has never been held in any case that a deed of alteration, or " of additional nomination of heirs, requires either a new conveyance " or a new procuratory or precept. On the contrary, in such cases " the prior rights or deeds, which form the basis of the title, are " taken up by the institute or heirs who have first occasion to use " them, for behoof of all interested in the destination, either as origi- " nally named or as afterwards altered and enlarged. The convey- " ance to, and possession by the first heirs, is a conveyance for " behoof of those afterwards brought in. This accordingly was one " of the points laid down by the great majority of the Judges in the " Duchal case, 1 *Shaw*, p. 9.

" In the present case, the deed of 1814 was merely a deed of " alteration, and in supplement of the deed of 1810. It did not " recal it, nor was it intended to subsist as an independent right. " On the contrary, the deed of 1814 expressly declared, that the

" deed of entail of 1810, 'in so far as not altered by these presents,
" 'shall still, *quoad ultra*, remain in full force and virtue.'

" III. The only other question is, whether there be any thing feu-
" dally inept in the titles, as completed in Major Anstruther's
" person during his minority?

" Here it is not enough to say, that as Sir Alexander Anstruther
" never completed a feudal title to the estate, a title might have
" been made up, which would have given the Major a right for a
" time in fee-simple, and so render it liable for his debts. The same
" might be done by every heir of entail if he ran the risk of forfei-
" ture. But if an heir be under a personal obligation to complete a
" title under the limitations of a tailzie, and does so regularly, can
" this be afterwards reduced?

" These are the proper questions here. From what has been
" already indicated, the personal obligation on the Major to complete
" a title under his father's deed of entail, and alteration thereof, does
" not appear easily disputable; and if so, the Lord Ordinary does not
" see what form of title could have been expede other than that
" which was done in the present instance.

" Miss Anstruther, the last infeft proprietor, was dead. The pro-
" curatory of resignation granted by her was unexecuted. It stood
" validly assigned, (as the Lord Ordinary assumes,) to the heirs of
" entail. Major Anstruther took up the personal right by a general
" service as heir of tailzie and provision, and he got a charter expede
" confirming Miss Anstruther's base infeftment, and giving a charter
" of resignation on her procuratory, as assigned by Sir Alexander to
" himself, under the conditions of both the deeds of entail. The
" Crown charter in favour of the Major affords evidence *in grœmio*,
" that the title on which the resignation proceeded was correctly
" set forth in the instrument of resignation which preceded the
" charter, as required by the act 1693, and being so, the Lord Ordi-
" nary doubts extremely if there be any grounds on which it would
" be safe here to set it aside. J. C."

RENTON v. ANSTRUTHER. — 1st March, 1842.

On the 5th December, 1837, the Court, without having heard counsel, pronounced the following interlocutor: —"The Lords, "on report of Lord Cunninghame, Ordinary, having advised "this case, with the pleadings and proceedings — Sustain the "defences, and assoilzie the defenders from the conclusions of "the libel, and decern: Find Mr Philip Anstruther, defender, "entitled to his expenses: Allow the account to be given in, "and remit the account, when lodged, to be taxed by the auditor "in common form."

The appeal was taken against this interlocutor.

Mr Solicitor General and Mr Gordon for Appellant. — We do not raise any question as to the right of Sir Alexander Anstruther to make the entail of 1810; all we dispute is, the form in which it was attempted to be made. The real right to the lands was in Catharine Anstruther, at the date of her conveyance to Sir Alexander. He might have vested that right in himself, by executing either the procuratory or the precept in her conveyance, but he never did so. When, therefore, the deed of 1810 was executed, Sir Alexander had in him a mere personal right to the lands; the radical real right was yet in Catharine. Accordingly that deed was prepared with the view of her being a party to it, but, in fact, she never did execute the deed; the right, therefore, which was in her prior to this, and which was recognized by the deed as being in her, was not taken out of her by it. The deed was never intended to operate as a disposition, but was framed for resignation by Catharine, the party feudally vested, which she never was.

While then Sir Alexander was thus unconnected with the lands, and had in him a mere personal right, he executed the deed of 1810, containing a procuratory of resignation for new infeftment; but he could not himself have resigned in the hands

of the superior, as was done by vassals prior to the use of procuratories of resignation, seeing he was not the vassal, or a person whom the superior was in any way bound to recognize. As little then could he give authority for resignation being made by another as his procurator.

He might, no doubt, though vested only with a personal right, have executed a disposition, which, if it had contained the usual clauses, would have enabled the disponee to make up a title. That would have been, by virtue of the dispositive clause in such a conveyance, carrying the right that was in Sir Alexander, aided by the assignation of writs and evidents, which would have entitled the disponee to take up the procuratory and precept in Catharine's disposition of 5th March, 1808.

But the deed of 1810, if it could not operate as a transmission of the real right, by the means of resignation, as little could it be the foundation of a title, transmitting the personal right in Sir Alexander. It did not contain any dispositive clause or its equivalent. No doubt, it contained an assignation to writs and evidents, but that is a clause incapable of transmitting any right in itself, and is intended merely in fortification of the conveyance which must be found elsewhere; it carries every thing going to the security of the estate previously conveyed, but if there be no such conveyance, as in this case there was not, it is wholly inoperative to supply its place, Shanks *v.* The Kirk-Session of Ceres and Others, *Mor.* 4295; Strachan *v.* Whiteford, *Hailes;* Graham *v.* Don, 18 *F. C.*, 102; Hamilton *v.* Montgomery, 12 *S.* and *D.*, 349; Maitland *v.* Horne, *ante*, p. 1.

Moreover, if Catharine had executed the deed of 1810, and the procuratory in that deed had been used as was intended, the procuratory in the deed of 1808 would have been unessential to the title. If, on the other hand, Sir Alexander having only a personal right, had executed a disposition, the procuratory in the deed of 1808 would have been an indispensable link in the title.

In the first of these views it is plain, that the assignation in the deed of 1810, was not intended to carry the procuratory in the deed of 1808.

[*Lord Cottenham.* — If the party had assigned all his right, and likewise assigned the writs, would that have been sufficient?]

We submit not. The act 1693, cap. 35, says, that the procuratory shall be a warrant "for making resignations and taking "seisins," but does not give the procuratory any farther effect.

[*Lord Campbell.* — *Qua* Procuratory of resignation by a party having a mere personal right, it was clearly right, but might it not be used as evidence of the intention of the party as to the destination of the title?]

We apprehend, that even if it might, this would be unimportant in the conveyance of a real right.

Supposing the deed of 1810 to be *per se* inept as a deed of transmission, and to have left the real right untouched in the person of Catharine, and the personal right in Sir Alexander at his death, the general service of Robert, as heir of his father, vested in him such personal right, and entitled him to take up the procuratory in Catharine's conveyance of 1808, so as to enable him to vest in himself the real right; but that procuratory authorized infeftment in favour of Sir Alexander, and "his heirs "whomsoever, and disponees," whereas the resignation on which the charter was expede by Robert, was in favour of himself and the heirs of entail in the deed of 1814, and under the conditions of the deed of 1810, for which the procuratory gave no warrant. This resignation was sufficient to vest a fee simple title in Robert, but beyond that was simply void as without a warrant, and wholly inoperative as the means of perfecting a title under the supposed entail. It could only operate in this latter way on the supposition, that Sir Alexander, to whom he served heir of entail, was institute under the deed of 1810, but if the appellant is right in the first branch of his argument, that deed never conveyed any

right to Sir Alexander, or any one else, to be taken up by service.

But in any view, the deed of 1810 was altogether superseded by the deed of 1814. That was not a deed of nomination, under a power to that effect in the prior deed, but was one which "revoked the said deed of entail, in so far as relates to the persons to be called and entitled to succeed," &c., under a reserved power of revocation and alteration. This prior deed, therefore, was destroyed, in so far as it could to any extent be a conveyance to Robert as one of "the heirs of the body" of Sir Alexander.

[*Lord Brougham.* — Does the second deed make Robert the institute.]

If it does not, then it is merely a testamentary deed expressive of the will of the maker.

The deed of 1814 contained no words of conveyance, but this is necessary in a deed revoking the destination in a prior entail, under a power to alter, and without it the deed is wholly ineffectual as a conveyance to the heirs mentioned in it, Stewart *v.* Porterfield, 2 *Wil.* and *Sh.*, 369; where the distinction was taken between a deed of nomination under a reserved power to that effect, and a deed of alteration and revocation. But, on the other hand, the revocation of the destination in the prior deed remains effectual, and cuts down any right in the heirs under the first deed, to found upon it as a title. The two must be taken as a *unum quid*; the second destination destroys the first.

If these views be correct, a personal right is in Robert Anstruther, by virtue of his general service, unaffected by either of the deeds of 1810 or 1814, and is attachable for his debts.

Mr Pemberton and Mr Anderson for the Respondent. — The appellant has left wholly untouched two of the grounds taken by the respondents in the Court below, 1st,—That Robert Anstruther, who is in truth the appellant, though nominally a respon-

dent, is barred, by his own acquiescence and acknowledgment, from questioning the entail; and 2d, That the appellant cannot, consistently with his own title, maintain such a challenge. Robert was not served heir to Catharine, but to his father, Sir Alexander, and as such he took up the procuratory in Catharine's deed, but subject to all the obligations upon his father. If, therefore, he had expede the procuratory, he would have been bound to execute the entail directed by the father's deed of 1810, and if that deed were ineffectual, then according to the destination in Sir Alexander's settlement of September, 1808. In that case, two resignations and two charters would have been necessary, whereas, in the course followed, only one of each was requisite, and that is the whole effect of what was done.

Having made up his titles, Robert conveyed to Maconochie and Paul, by a deed which was framed with a view to preserve the entail. He afterwards borrowed money to pay off the debts by which Maconochie and Paul's trust was created, and by his direction they conveyed to the appellant by a deed similar in frame to their own conveyance. The appellant, then, is a trustee to pay off creditors, and preserve the entail. In this situation the bill and promissory note are granted by Robert Anstruther to the appellant. The notion of Renton, in such circumstances, being a *bona fide* creditor, dealing on the faith of a fee simple estate in his debtor, is a mere juggle. Moreover, the debt of the appellant was positively denied by the defences, and no evidence has been led to prove it.

If Robert cannot question the entail, as little can the appellant. Before he can do so he must place himself in a position different from that of Robert; at present he is in the same position.

It is admitted, that a party not infeft may make a disposition, and that it will carry personal rights. It does so because it declares the intention of the maker, that the right shall pass, though the granter cannot himself convey the lands; all that it

does is to make an obligation on the granter to perfect the conveyance. The disposition operates not as a conveyance *per se*, but only as a declaration how the conveyance is to be made. What difference then can there be between saying, I dispone, and I oblige myself to infeft? The deed of 1810 shewed intention, *per verba de presenti*, that the estate should pass, and carried the procuratory which gives the title. What more then could be required?

[*Lord Brougham.* — Do you read the clause of assignation as giving "all right, title," &c. ?]

Yes.

[*Lord Campbell.* — Sir Alexander could as little resign as dispone.

Lord Brougham. — A party having a personal right, by disponing does not affect to deal with the *ipsum corpus*; by resigning he does, by symbolical delivery.]

In the case of Graham *v.* Don no question was made as to dispositive words. In Napier *v.* Livingston, 5 *Bro. Supp.*, p. 885, the fetters are stated to have been in the procuratory, whereas, had there been a dispositive clause, they would have occurred in it. And in the Juridical Styles, a clause of assignation to writs is directed to be inserted in a procuratory for making an entail as auxiliary to it in the same way as in a disposition. But at all events, Robert, as heir of his father, was bound to make the entail good, and all that can be complained of is the mode in which he made up his title.

[*Lord Cottenham.* — Suppose he had made up his title as the appellant says he ought to have done, and so standing, a creditor had adjudged.]

We submit that the first procuratory did pass under the assignation of writs under the deed of 1810, and he could contemporaneously have entered as heir under the second procuratory.

The objection taken upon the deed of 1814 was not raised by

the summons, and the parties claiming under it were not before the Court. At all events, the respondents are not affected by that deed, and it does not therefore touch their case.

Before the counsel for the respondents had concluded, their Lordships consulted together, and then the

LORD CHANCELLOR said, — This is stated, on both sides, to be a question of great importance with respect to Scotch titles. It appears not to have been argued before the learned judge, the Lord Ordinary, who decided the case in the first instance. It was not even argued before the whole Court, and, unless the appellant objects to it, we think, from the importance of the question, that it is proper that it should be remitted to the Court below, with an intimation, that they should call in the assistance of the learned judges for the purpose of deciding the question. If the appellant objects, we must hear him, and then we must afterwards decide, whether or not, under all the circumstances of the case, we shall direct it to be remitted.

Mr Solicitor General. — My Lord, we shall offer no objection to any course which your Lordships may think right to adopt.

Lord Chancellor. — This has occurred to us in the progress of the cause, and we think it is the only safe course that we can pursue, considering the nature of the question.

Lord Brougham. — To remit the case upon the first point.

Lord Chancellor. — We had better remit the whole question in the usual manner, with an intimation, that they should take the opinion of the consulted judges; a direction in the usual mode.

Mr Solicitor General. — So I understand your Lordship.

Lord Chancellor. — The case must not be decided on papers only, but be argued *viva voce*.

Mr Anderson. — And the learned judges are to report to your Lordships their opinions upon the question.

Lord Chancellor. — Yes, we have, in the course of the argument, been satisfied that that is the only course that we should be justified in pursuing, considering the nature of the question.

Lord Campbell. — It certainly is very important that the deed in that case of Napier v. Livingstone should be examined, and other deeds executed under similar circumstances, where a person, having a personal right, has executed an entail.

Mr Anderson. — There will be no difficulty, my Lord, in getting the deeds, because they are all preserved.

Lord Brougham. — You have them all in the Registry of Entails.

Mr Gordon. — Yes, my Lord.

Ordered, that the cause be remitted back to the Second Division of the Court of Session, in Scotland, to review generally the interlocutor complained of, with an instruction to the judges of that division to order the same to be argued *viva voce* before the whole judges, including the Lords Ordinary, and to report their opinions thereon to this House; and this House does not think fit to pronounce any judgment upon the said appeal until after the said interlocutor shall have been so reviewed, and the opinions thereupon shall have been reported, according to the directions of this order.

ROY, BLUNT, DUNCAN, and JOHNSTONE — SPOTTISWOODE and ROBERTSON, Agents.

[4th March, 1842.]

JAMES BALFOUR, Clerk to the Edinburgh Water Company, on behalf of the Company, Appellants.

JAMES MALCOLM, Writer in Edinburgh, Respondent.

Jurisdiction.—A statute enabling a Water Company to levy certain rates on the inhabitants of a city, and declaring, that "all actions, "or suits relative to this act, and all fines, penalties," &c. should be sued for by summary complaint before the Sheriff, and should not "be subject to the review of any court or courts whatever," held to exclude the jurisdiction of the Court of Session, over an action put into a declaratory form, as to the rights of the Company to levy the rate after a certain mode.

Process.—*Semble* Where a statute gives a right to a Water Company to levy a rate of water duty, the right under the statute cannot be the subject of declarator, so as to form an exception to exclusive jurisdiction, given by the statute to the local court, but is matter of ordinary interpretation for the local court.

BY the 29 Geo. II. cap. 74, and 25 Geo. III. cap. 28, the Magistrates of Edinburgh had powers given to them to supply the inhabitants of the city with water. By the 59 Geo. III. cap. 116, and 7 Geo. IV. cap. 108, the Edinburgh Water Company was incorporated, the powers previously vested in the Magistrates were transferred to the Company, and certain regulations were enacted in regard to the supply of water, and the mode of rating the inhabitants. By the 59 Geo. III. the Company were empowered to levy a rate not exceeding five per cent on the real rent of the houses. By the 7 Geo. IV. this was altered to a rate not exceeding 10d per pound, on the real rent of the houses, "at

" which they may be assessed for the police tax of the city." At the time when the 7 Geo. IV. was passed, the rating to the police tax was regulated under 3 Geo. IV. cap 78, and was so much upon "the real yearly rent without deduction." But by 7 Will. IV. the police rating was altered, and the commissioners under the act were required to assess "on the yearly rent or " value of premises, which assessment shall be made on four-" fifths of the rent or value of the premises."

The Water Company, on the assumption that their rating was not affected by the 7 Will. IV., laid an assessment on the full "real rent" as they had been in use to do, while the 3 Geo. IV. regulated the police rating. Malcolm, one of the inhabitants, refused to pay the rate made upon his house, and insisted that as the Company were by 7 Geo. IV. empowered to rate houses on the rent "at which they may be assessed for the Police Tax;" and the rent on which this assessment was levied, was by 7 Will. IV., altered to four-fifths of the rent, the Company could not assess on a greater proportion of the rent than four-fifths.

In consequence of Malcolm's refusal to pay his rate, the Company threatened to cut off the pipes for supplying his house. By the 59 Geo. III., various remedies were to be obtained by application to the Sheriff; but by sect. 26, all calls made by the Company upon the partners, were to be sued for "in any com-" petent Court in Scotland, or in any of his Majesty's Courts of " Record at Westminster," and by the 80th sect. of 7 Geo. IV., it was enacted, "That all actions or suits relative to this " act, and all fines, penalties, damages, and expenses, to be re-" covered under this act, and the before recited act," (59 Geo. III.) "and for which no remedy is previously provided, shall be " sued for by summary complaint before and judged of by his " Majesty's Sheriff-depute for the county of Edinburgh, and " before no other court or courts, and his judgments shall be

"final and conclusive and not subject to the review of any "court or courts whatever, any law or custom to the contrary "notwithstanding, unless where the sum in dispute is of so small "amount as to be recoverable before the Justices of the Peace "for the city and county of Edinburgh, in which case their "jurisdiction shall not be excluded."

Malcolm, under this provision of the statute, presented a petition to the Sheriff of Edinburgh against the Water Company, in which he set forth, that his house during the first year of his occupancy was assessed for L.1, 17s. 6d., but on his shewing the assessment for the Police tax, the Company had reduced their assessment to L.1, 12s., and taken payment accordingly; but that they had now increased the assessment to L.1, 17s. 6d. and threatened to enforce payment. On this narrative he prayed the Sheriff to interdict the Company from stopping the supply of water to his house, on account of the non-payment of the rate, and "to find that the said Company have no lawful right to "exact from the petitioner more than the foresaid sum of L.1 "12s. as the water rate corresponding to the rent of his said "dwelling-house, for the current year."

The Water Company thereupon brought an action against Malcolm, in the Court of Session, by a summons, which set forth the various provisions of the different statutes — that the Company had on 26th April, 1838, determined that the rate should be 10d. in the pound, on nine-tenths of the full yearly rent of houses, as disclosed by the amount of rents on which the Police assessment was levied. "That some individuals, and "amongst the rest" Malcolm, had refused to pay the rate charged against them, on the ground that they were not liable to pay on a greater proportion of the rent than that upon which the Police rate was levied, — that the total rent of Malcolm's house was L.48, that the water rate payable on nine-tenths of that sum, amounted to L.1, 16s. The summons then set forth

Malcolm's refusal to pay, and the petition which he had presented to the Sheriff, — that the Sheriff had appointed the petition to be served upon them, and granted interim interdict, — that their right to collect the rate levied by them, "being thus called in "question, it is necessary that the said Company should have "their right and title to exact the said water duty of 10d. in "the pound, on the full yearly rent or value of dwelling-houses "situated within the bounds of Police, ascertained and adjudged." Therefore, it should be "declared, that the said Company are "authorized, and have full right and title, under the statute 7 "Geo. IV. cap. 108, before recited, to levy and exact from the "defender, a water rate or duty, which shall not exceed 10d. in "the pound, on the full yearly rent of his said house, as disclosed "by the police rental, in manner foresaid, and to levy and "exact from him the foresaid sum of L.1, 16s. being a duty which "does not exceed 10d. in the pound, of nine-tenths of the said "full yearly rent of his said house, as disclosed by the said "police rental, and also, in the event of the rates and duties, "exigible from the defender not being paid, that the said "Company have right under and by virtue of the said recited "act, to cut off and separate the private pipe or pipes by which "the water is conveyed from the pipes and reservoirs of the said "Company, to the said house of the defender, so as to prevent "water being conveyed to the said house, aye and until the said "rate or duty shall be paid, and also to exercise and enforce all "the other provisions made by the said statutes, in relation to "the recovery of the said rate and duty," with a conclusion for expenses.

Malcolm pleaded preliminarily, — 1st, That all parties interested had not been called; 2d, That the subject matter of the action was *lis alibi pendens*; 3d, That the action was incompetent under the statute; 4th, That the action was farther incompetent, as not involving matter of sufficient value.

BALFOUR *v.* MALCOLM. — 4th March, 1842.

The Lord Ordinary, 1st March, 1839, "sustained the second, "third, and fourth preliminary defences," and "dismissed the ac- "tion." The Water Company reclaimed to the Inner House, and there cases were ordered. And on the 15th of January, 1840, the Court pronounced the following interlocutor: — "The Lords having advised the mutual cases, and heard counsel for the parties, "recall the interlocutor complained of, in so far as it sustains the "second and fourth preliminary defences; *quoad ultra*, adhere "to the same, and to that extent refuse the desire of the re- "claiming note, and decern."

The Water Company appealed against the interlocutor, both of the Lord Ordinary and the Court. And Malcolm took a cross appeal against the interlocutor of the Court, in so far as it recalled that part of the Lord Ordinary's interlocutor which sustained the second and fourth defences.

B. Andrews and Austin, for appellant.—The 80th sect. of 7 Geo. IV. was only meant to confine to the jurisdiction of the Sheriff, actions which by their nature are competent before him, but in which his jurisdiction is cumulative with that of the Supreme Court. This action is one purely declaratory, both in its subsumption and conclusions, its only petitory conclusion is for expenses. Such an action never was competent before the Sheriff, but is confined to the Court of Session. There is nothing in the statute conferring a new jurisdiction upon the Sheriff, and making such an action for the first time competent before him. If then the action be not competent before the Court of Session, by reason of its exclusion in this section, and no new jurisdiction be given to the Sheriff, the action is taken away altogether.

[*Lord Chancellor.* — It may have been the intention of legislature to do so, by taking away means of harassing the subject.]

But this House will not presume that the jurisdiction of the Supreme Court is excluded, or a form of action destroyed, from inference as to the intention of the legislature. The language for this purpose must be express and unequivocal, Buchanan *v.* Tenant, *Mor.* 7347; Russell *v.* Glasgow Road Trustees, *Mor.* 7353.

[*Lord Chancellor.*—You need not cite cases to prove that,—the question is, whether the act does not take away the jurisdiction.]

Though the section sets out with saying all actions and suits, yet these expressions are followed by a particular enumeration. The general words, therefore, must be restrained by the particular words, and these apply only to matters, the subject of a petitory action. The section must be construed with reference to the existing rule as to actions competent before one judicature or another.

[*Lord Chancellor.* — In your view the previous words would be wholly unnecessary.

Lord Brougham. — The expression "sued *for*," would seem to be more applicable to penalties; you cannot "sue for" a "suit," or "action."

Lord Chancellor. — "Shall be judged," would apply to suits and actions.]

There is much confusion and ambiguity in the terms of the section; too much to make it possible to exclude the jurisdiction of the Supreme Court, in an action competent before it alone. Besides, the House will observe, that in the 13th section of 7 W. IV. the 80th section of 7 Geo. IV. is adopted, with the omission of the general expressions "all actions and suits," plainly shewing the intention of the legislature to guard against the clause in the prior statute, receiving application to other matters than those of a petitory nature. In Balfour *v.* Waugh, 2 *S.* and *M.* 530, the objection of want of jurisdiction was never suggested, even though it would have been equally open as in this case.

[*Lord Chancellor.* — The 13th section of 7 W. IV. may go all the length that was necessary for the purpose of that act. It and the 80th section of 7 Geo. IV. may very well subsist together.]

The acts must be construed as *in pari materia*, and as they leave the question of jurisdiction doubtful, the jurisdiction cannot be held to be taken away. There are many suits "relative to "the act," which surely could not be competent before the Sheriff, under the 80th section: Such as questions respecting the purchase of land by the Company: Reduction of a contract to supply a whole street with water, on the ground of fraud. It will hardly be maintained that the jurisdiction of the Supreme Court is ousted, and the form of action destroyed, as to actions embracing these questions, which are confessedly not competent before the Sheriff; but the argument must be carried to that extent, to shew that the jurisdiction is taken away as to this declarator, which, though it embraces only an annual payment of 4s. will affect by its decision nearly one-fifth of the revenue of the appellants.

[*Lord Chancellor.* — Are you to have that question determined at the cost of the appellant?]

No doubt the respondent has parties behind him, and if we cannot have relief by this action, we cannot have it at all, but must contest the right with every rate payer.

We will not trouble the house on the matter of the cross appeal, but reserve ourselves for the reply, in case it should then be necessary to make any observation upon it.

Pemberton and Anderson, for respondent. — I. The case has been argued for the appellant as if the action were to declare a general right, but if the conclusions of the summons are looked at, there is nothing in the case but the right of the appellants to the sum of 4s. Though judgment were given in terms of the

conclusions of their action, it would not bind the rights of any body, not even of the respondent himself, except to the extent of 4s. All that the summons asks is, that the appellants are entitled to levy from the respondent the sum of L.1, 16s. "on "his said house," instead of L.1, 12s. as he says; next year the respondent may leave the house, or the rent of it may be raised, or it may be lowered, the assessment will then be altered, and the judgment will no longer be of any avail. There is no declarator of any general right asked, except as regards this particular house, nor any thing that was not perfectly competent for the Sheriff to entertain.

[*Lord Brougham.* — May be a good declaration as to the purposes of this suit, but none which could apply to the public generally.]

Exactly so. The respondent does not represent any body, neither the person who will occupy his house next year, should he leave it; the persons who live next door to him, or in the same street, or any body, in short, who could be affected by the judgment against him.

All that is asked by the summons, was raised by the prayer of the petition for interdict before the Sheriff, and so far as any declaration could have been necessary by the Sheriff in explicating his jurisdiction in a suit otherwise competently before him, there is nothing to prevent his making it, Hall *v.* Grant, 9 *S. D.* and *B.* 612. The suit before the Sheriff involved, as this action does, and as every application for payment of rates under the statute must do, the construction of the statute, and no more; so that, in truth, any argument about the competency of a declarator before the Sheriff cannot arise.

But even as to that, the terms of the section are as express for the exclusion of the jurisdiction of any other Court than that of the Sheriff, as could be framed; and if any doubt on the subject could be entertained, it is removed by the other clauses of the

act, where the special tribunal of the Sheriff is put aside, and the ordinary jurisdiction left open when that is intended. In Aberdeenshire Trustees v. Kennedy, *Hume's Coll.* p. 262, the jurisdiction of the Court of Session was held to be excluded, where words were merely, that the Sheriff should "finally determine." So also Merry v. Dallas, 7 *S.* and *D.* 90; Simpson v. Harley, 8 *S.* and *D.* 977; Lindsay, 9 *S.* and *D.* 426; Lang v. Craig, 11 *S.* and *D.* 424.

The effect of the appellant's proceeding is first to ask a declaration of his right by the Court of Session, and then he will bring his action for payment before the Sheriff Court.

[*Lord Brougham.* — Can there be a declaratory action to declare the construction of an act of Parliament, and consequent on that to charge the party with liability for payment of money?]

Surely not, and if it could, the consequences would be intolerable, for then such a proceeding would be open to every rate-payer against the Company, and to the Company against every rate-payer.

II. The matter of the suit was raised before the Sheriff, and this action, therefore, was incompetent. The process of interdict asked the same declaration as the summons.

[*Lord Chancellor.* — The declaration asked for in the interdict amounts to nothing; it merely asks the Sheriff to state the reasons of his judgment; it cannot amount to more.]

III. But at all events, the action is incompetent, as the summons shews upon its face that the value is below L.25; the capital of 4s., the sum in dispute, would not be that amount, even taking the right sought to be declared to be in perpetuity, whereas it is only for one year.

[*Lord Chancellor.* — If the summons is not one of declarator, what is it? Whether it is competent as a declarator is another

question, and if it *is* a declarator, then it comes under a class of cases as to which value has no application.]

LORD BROUGHAM. — My Lords, I believe your Lordships have no doubt that the Court of Session has well decided this case upon all the points, that of the jurisdiction of the Court being taken away by the right construction of these words in the act of Parliament, and the other two grounds on which the Lord Ordinary grounded his interlocutor, namely, the *lis alibi pendens*, and the finding as to L.20; all of them being inapplicable to this case. I am of opinion that the Court rightly decided in the judgment they gave upon those findings of the Lord Ordinary, which judgment is brought under review by the cross appeal.

I have very great doubts, indeed, whether this action of declarator was competent; but be that as it may, we have no reason to enter into that inquiry, for if competent as an action of declarator, it appears to be the intention of the legislature to take it away, and to leave the remedy only to be prosecuted in the Court of the Sheriff. The words of the act are somewhat inartificial, and somewhat clumsily applied, if we may venture to say so with reference to any words which have obtained the sanction of the legislature, as an expression of its intention; but on the sound construction of the clause, I am of opinion with the Court below, that the jurisdiction is taken away as regards the Court of Session, and is confined to the Sheriff.

With respect to the action of declarator, it is sufficient to say this is an action of declarator, or it is not. It seeks something to be declared which the action before the Sheriff does not seek to have declared. The action before the Sheriff seeks to have something found due, and something ordered to be paid, and as the ground of that finding of something due, and something ordered to be paid, it seeks for the Sheriff to assume a certain

proposition; but that is not the subject matter of the action, that is not the thing sought at the hands of the Court of Session. The thing sought at the hands of the Sheriff's Court is, that something should be declared to be due, that is the ground on which they state the summons before the Sheriff, that the finding of the Sheriff ought to be in favour of the party; but the action before the Court of Session does not seek that something may be found due, and that something may be ordered to be paid, it seeks a declaration of the right; whether that was competent, with a view to the *lis alibi pendens*, is quite immaterial; it is sufficient to say, that the conclusion of the summons in the action before the Court of Session is one thing, and that that which is sought in the action before the Sheriff is another thing.

On these grounds I am of opinion, differing from the Lord Ordinary, that the decision of the Second Division of the Court of Session is right.

Lord Campbell. — My Lords, I entirely agree with my noble and learned friend in the view he has taken of the different points which arise in this case. With regard to the main question, there is no doubt that the jurisdiction of the Supreme Court is only to be taken away by positive acts of Parliament: but the words here appear to me to be positive and express, for it is enacted, that "all actions or suits relative to "this act, and all fines, penalties, damages, and expenses to be re- "covered under this act, and the before recited act, and for which "no remedy is previously provided, shall be sued for by summary "complaint before the Sheriff-Depute for the County of Edin- "burgh, and before no other court or courts, and his judg- "ment shall be final and conclusive, and not subject to the "review of any court or courts whatever." Now, language hardly can be more pointed for the purpose of taking away the jurisdiction of all other courts. The only question, therefore, that can be made is, whether this action of declarator is included

within this clause, "all actions or suits relative to this act." It is not necessary to give an opinion whether, if a dispute were to arise over which the Sheriff had no jurisdiction in any shape, such as respecting the particular rates demanded, the Court of Session would be deprived of its jurisdiction by these words; but this is a subject matter over which the Sheriff clearly has jurisdiction, for there may be a remedy before the Sheriff, and the Sheriff would put a construction on the act of Parliament, not in an action of declarator, but he would say whether the rate should be levied on four-fifths of the rent, or the whole rent, and would decide accordingly. It appears to me, that this remedy must be pursued before the Sheriff-Depute for the County of Edinburgh, and that the jurisdiction of the Court of Session is taken away, and that it is a very reasonable enactment. The Sheriff for the County of Edinburgh is a Judge always of high rank, taken from the Bar of Scotland, and deserving of great confidence; and this act is quite analogous to one to be found in this country, where the writ of certiorari is taken away; where the decision of the Quarter Sessions is quite conclusive, and the Court of Queen's Bench is ousted of its jurisdiction.

Then, with regard to the *lis alibi pendens*, I entirely concur in what has fallen from my noble and learned friend, that, whether the action was competent or incompetent, you cannot say it is the same. As at present advised, I should say such an action, requiring an abstract decision on a public act of Parliament, could not be maintained; but still we must treat it as an action of declarator, or it is none, there is no petitory conclusion. There is a clear defence to the action on that ground. Then, if it is to be treated as an action of declarator, that not only is not the same as the action before the Sheriff, but it is not embraced in that action. If it were a part of that embraced in the action, it would be said to be *lis alibi pendens;* for though the remedy sought before the Sheriff may be more extensive, this may be included;

but it does not embrace it, it merely calls on the Sheriff to make this declaration *ratione decidendi*, but not to be followed by the consequences of an action of declarator.

Entertaining, my Lords, the most sincere respect for the Lord Ordinary, I am rather surprised that he should have thought that was a bar to the proceeding, because one can hardly say, that because that act of Parliament on which the defence is founded clearly applies only to actions before the inferior Court, an action of declarator cannot be brought before the inferior court; with regard to value, an action of declarator does not sue for damages, or for the payment of a sum of money, it is almost impossible to put any value upon a declaration. The object is merely to have the declaration of a right.

On these grounds I have no difficulty at all in coming to the opinion that the decision of the Inner House on all the three points is perfectly correct, and that the judgment should be affirmed.

Lord Chancellor. — My Lords, I am entirely of the same opinion. Some reliance was placed in the Court below on the statute of William the Fourth, but that has not been insisted upon at the bar. It appears to me that that statute does not at all take the case out of the operation of the act of 59 George III. I agree in that which has been said by my noble and learned friend, that the clauses of this act are clumsily expressed, but it appears to me impossible to put any other construction upon them, than that the jurisdiction of the superior Court is taken away; and I come to this conclusion with the less regret, because it is quite clear the parties can have as effectual a remedy in the Court below as to ascertaining the question of law, and as to recovering the amount as they can have in the superior Court. I think, therefore, the judgment of the Court below should be affirmed.

Lord Brougham. — The costs of the original appeal should be given, but not on the judgment in the cross appeal.

Ordered and Adjudged, That the original appeal be dismissed this House, and that the interlocutors, so far as therein complained of, be affirmed with costs. And it is farther Ordered and Adjudged, That the cross appeal be dismissed this House, and that the interlocutor, in so far as therein complained of, be affirmed.

G. and T. W. WEBSTER—JOHNSTON and FARQUHAR, Agents.

[Heard, *March*, 1841. — Judgment, *7th March*, 1842.]

MRS CLEMENTINA ALLAN, or DICKSON, Appellant.

ALEXANDER BRANDER, Esquire; and MISS CATHERINE WILLIAMSON, Respondents.

Prescription. — Where purchasers, under a ranking and sale, had granted bond for their purchase money, payable at a definite term, and "that to those who shall be found to have right thereto by the "decreet of ranking;" and no claim for payment or otherwise had been made upon the purchasers for upwards of forty years, *found*, that creditors, before any decree of ranking had been made, were not, in the circumstances, entitled to an order for consignation upon the purchasers under the 6th sect. of 54 Geo. III. cap. 137.

Ranking and Sale. — If the creditors do not insist upon consignation by the purchasers of the lands within forty years from the term at which the price is payable, under the purchaser's bond, their right to do so will be cut off by the negative prescription.

ON the 21st December, 1836, Mrs Clementina Allan, or Dickson, as daughter and only child of the deceased Elizabeth Allan, and Alexander Allan, and other persons, creditors-claimants in the process of ranking of the creditors of the deceased John Hay, and John Logan, common agent in the process, presented a petition to the Court of Session, in which they set forth: That in the year 1786, a summons of ranking and sale had been brought at the instance of Patrick Copland, as trustee for Elizabeth Allan and Alexander Allan, against Alexander Hay, grandson and apparent heir of the deceased John Hay, and the other creditors of John Hay: That after the usual preliminary procedure had taken place, an act of roup was pronounced and extracted, and the subjects belonging to the bankrupt were sold, on the 6th June, 1792, in three separate lots, particularly described, and were purchased as follows, viz.: —

Lot 1st. By Walter Scott, at the price of L.280 sterling, for behoof of Alexander Brander, merchant in Elgin; Lot 2d. By Mr William Williamson, merchant in Elgin, at the price of L.380 sterling; and, Lot 3d. By Hugh Warrender, for behoof of the then Earl of Findlater and Seafield, at the price of L.235 sterling: That the prices were declared to be payable at Martinmas, 1792, and to bear interest from Martinmas, 1791, the term of entry being Whitsunday, 1792; and, in terms of the articles of roup, bonds were granted by the several purchasers, along with cautioners, for payment of the prices of their respective purchases, "at the said term of Martinmas, 1792, with the "annualrent thereof, from the term of Martinmas, 1791," with a fifth part more of penalty, and "the interest of the said prin- "cipal sum from and after the said term of payment, so long as "the same shall remain unpaid, and that to those who shall be "found to have right thereto by the said decreet of ranking "and scheme of division." That on the bonds being lodged in process, decreet of sale was pronounced in favour of the purchasers, upon the 6th July, 1792, whereby the subjects were sold, adjudged, decerned, and declared, to pertain and belong to the respective purchasers, heritably and irredeemably, "from and after the said term of Whitsunday last, (1792,) "and in all time thereafter, upon payment or consignation, "by the said Alexander Brander, William Williamson, and "Hugh Warrender, or their foresaids, of the prices they are "respectively bound to pay, as aforesaid, and that to those "who shall be found to have right thereto, by the decreet of "ranking and scheme of division to be made out and approven "of thereanent, and that at the term of Martinmas next, in this "present year, 1792, with a fifth part more of the said respective "prices of penalty, in case of failzie, and of the annualrent of "the said prices, from and after the said term of Martinmas "last, 1791, to the said term of payment, and in all time there- "after, during the not payment." That the purchasers entered

into possession of their respective purchases, and they or their representatives had held possession ever since, but had never yet paid or consigned the prices. That a state of the interests, and order of ranking of the creditors, was prepared by Alexander Grant, deceased, the common agent, in which certain objections were stated against the claims of some of the creditors, and in consequence, a discussion ensued with these parties, before the Lord Ordinary: That on the 31st January, 1800, Lord Armadale, Ordinary, before answer, remitted "to Mr Robert Allan, "accountant in Edinburgh, to consider the report, objections, "answers, and replies, to Isobel and Christian Hay's debts, to "make up a state of their claims, and to report the same to the "Lord Ordinary." That the process appeared to have been [illegible]d before Allan, and to have been kept alive by renewals of the remit to him for three or four years; but it was understood that Allan never made any report; and it did not appear, that after 1804, or 1805, any farther proceedings took place in the process. That some of the parties died, and their representatives being minors, the process was allowed to fall asleep. That Grant, the common agent, likewise died soon afterwards; and it was believed that all the original parties to the process were now also dead. That the process had lately been revived by a summons of wakening and transference, brought at the instance of the petitioner, Mrs Dickson, and the representatives of all parties having interest had been called either personally or edictally. That decree of transference had been pronounced by Lord Fullerton, Ordinary, on 6th July, 1836; after which, upon a petition for the pursuer of the wakening and transference, the process had been remitted by the Court to the Lord Ordinary, and the petitioner, John Logan, had since been appointed common agent. That as the matter had been allowed to stand over for so many years, and the prices were still in the hands of the purchasers, who had all along been in the possession of the subjects,

and drawing the rents, the petitioners had been advised that it was their duty to apply to the Court for a warrant on the purchasers, or their representatives, to consign the prices of their respective purchases, with interest. That by the Act 54 Geo. III. cap. 137, sect. 6, it was enacted, that "in every case of a "sale under the authority of the Court of Session, it shall be "lawful to the purchaser, at any term of Whitsunday or Martin-"mas subsequent to the term of payment of the price, to lodge "the price, with the interest due upon it, in the Royal Bank, or "Bank of Scotland, or the Bank of the British Linen Company, "at such interest as can be procured for it, by doing which, and "by giving notice thereof to the agent who carried on the sale, "he shall be discharged of the said price; and farther, the "Court of Session, upon the application of any of the creditors, "shall be empowered to make an order on the purchaser to "lodge the price and interest at any of the said terms subse-"quent to the term of payment, in one or other of the said "banks, sufficient intimation being always previously given, both "to the purchaser and to the common agent for the creditors, "that such application is made, in order that all parties may "have an opportunity to object." That it was understood that Alexander Brander, the purchaser of the first lot, was dead, and that his heir and representative was his son, Alexander Brander. That it was likewise understood, that Williamson, the purchaser of the second lot, was dead, and that Catherine Williamson, his daughter, was his representative. That with regard to the third lot, the subjects had, ever since the sale, been in the possession of his Lordship and his representative, the present Earl of Seafield.

On this narrative the petition prayed the Court "to ordain "the petition to be intimated to the said Alexander Brander, "Catherine Williamson, and the Earl of Seafield, as the re-"presentatives of the purchasers of the said subjects, and on the "Honourable Colonel Francis William Grant, curator-at-law

"of the said Earl; and thereafter, to grant warrant to, and "authorize and ordain the said Alexander Brander to consign "in the Bank of Scotland the said sum of L.280 sterling, being "the price or purchase money of lot first of the said subjects, "with the legal interest thereof from and since the term of "Martinmas, 1791, accumulated at the end of every ten years, "or at such other longer or shorter periods as your Lordships "shall deem just and reasonable, until the day of consignation; "and, in like manner, to grant warrant to, and authorize and "ordain the said Catherine Williamson to consign in the Bank "of Scotland the said sum of L.380 sterling, being the price of "lot second of the said subjects, with the legal interest therof "from and since the said term of Martinmas, 1791, accumulated "as aforesaid; as also, to grant warrant to, authorize, and or-"dain the said Earl of Seafield and his curator-at-law, to con-"sign in the Bank of Scotland the foresaid sum of L.235 sterling, "being the price of lot third of the said subjects, with the legal "interest thereof, from and since the said term of Martinmas, "1791, accumulated as aforesaid; and upon such several con-"signations being made, and the bank-receipts produced in pro-"cess, to exoner and discharge the said parties and their "respective cautioners of the said prices, and grant warrant to, "and authorize and ordain the clerks of Court to deliver up to "them their respective bonds of caution; or to do other-"wise," &c.

Brander put in an answer to this petition, in which he stated, that lot first had been purchased for a person of the same name as his father, but that his father had joined in the bond of caution for payment of the price, and the price had been duly paid. That after the purchaser's death, his successor sold the subjects to his, Brander's father, and gave him a title by disposition and infeftment, and that no demand had ever been made, either upon him or his father, on the footing of the price under the judicial sale not having been paid.

Williamson also put in an answer, in which she stated, that her father had left a settlement, by which he conveyed his whole property to her, and her brother and sister. That she never had heard her father allude to the subject mentioned in the petition; and, from his well known habits of regularity, she felt satisfied, that if the purchase charged had in fact been made by him, which seemed probable, he had paid the price at the time.

Upon these statements of the facts, and of their knowledge, both Brander and Williamson pleaded, among other things, 1st. That the claim, so far as founded on the bond granted in 1792, was cut off by the negative prescription. 2d. That it was barred by the unaccountable *mora* of the petitioners.

A record was made up by condescendence and answers, in which the petitioners stated, that the common agent had died in 1806, and that the representatives of the creditors being minors the process of ranking and sale was allowed to fall asleep. The first of these statements was admitted by the respondents. The second was neither denied nor admitted. In answer to the pleas stated by the respondents, the petitioners pleaded, 1st, That there were no *termini habiles* for the currency of the negative prescription of the bonds, by reason of *non valentia agendi*, as the parties to whom the obligation was prestable had never been ascertained by any decree of ranking.

The Lord Ordinary, after closing the record, ordered cases by the parties; and, on advising these papers, he made avizandum with them to the Court. When the case came before the Court, they had some doubts as to whether the plea of prescription was not well founded. In consequence, they ordered farther arguments upon this point, by one counsel on either side, and thereafter, on the 8th March, 1839, they pronounced the following interlocutor: "The Lords having advised this petition, with the revised cases "for the parties, and heard counsel in their own presence, they "sustain the plea of prescription, dismiss the petition, and de-"cern: find the petitioners liable in expenses, and remit," &c.

The appeal was taken against this interlocutor.

Mr Pemberton and Mr Anderson for the appellants. — The bond here is not to any creditor or other obligee, but to the Court, and therefore cannot be liable to prescription, but if it be as against the creditors, *contra non valentem agere non currit prescriptio*, *Ersk.* III. 7. 37. Until decree of ranking and scheme of division, the creditors to whom the bonds were payable were not ascertained, nor the proportions in which they were entitled. Until then there was no one entitled to make any claim under the bond. That decree has never yet been pronounced, nor the scheme prepared; there has not therefore been at any time during the currency of the forty years, a party having a right to sue upon the bonds which could be the subject of prescription; and without such a right, prescription has no place, Gaw, *Mor.* 11,183; Bruce, *Mor.* 11,185. The presumption of the negative prescription is not payment, but abandonment of the claim, *Ersk.* III. 7, 15, and 39; 1 *Bell's Com.* 335. But so long as the action of ranking was in existence, there could not be ground for such a presumption. The presumption, moreover, is elided if any just cause of forbearance can be assigned, Mackie, *Mor.* 11,204; Elliot *v.* Aitchison, *Mor.* 11,209; Ramsay *v.* Ogilvie, 2 *Fount.* 77; Scott *v.* Buccleugh, *Mor.* 11,192; Anstruther *v.* Rothes, *Mor.* 10,713; Wemyss *v.* Advocate, 5 *Bro. Supp.* 933. And the case must be much stronger where, as in the present, the document of debt bears upon its face the impediment to action.

The Court below has held the power of exacting consignation to be equivalent to the power of suing; but the statute 1469 is, that the party "shall take document" upon the obligation within the forty years. If the party could not sue, how could he take document. The statutes 1469, cap. 28, and 1474, cap. 54, speak of "following the obligation;" and the act 1617, cap. 12,

of "action being pursued," and do not deal with equivalents, such as exacting consignation or otherwise. There must, therefore, be a party in a situation to "follow the obligation," or "pursue "action," before these statutes can have application. Formerly the sale of the lands was under a distinct action, and the ranking of the creditors was under a separate action of multiplepoinding, and the bond by the purchaser was to pay to the creditors at the first term after they should be ranked; so long, therefore, as the action of ranking was not prescribed, or was subsisting, prescription could not run upon the bond, though much more than forty years should have elapsed from its date; this was found in Middleton *v.* Falconer, 5 *Bro. Supp.* 320, *Mor.* 13,353. Afterwards, the rule of procedure was altered by act of regulations 1695, and the ranking of the creditors was made to precede the sale. But by the statute 23 Geo. III. cap. 18, the old rule was reverted to, the two actions of sale and multiplepoinding merged into the form of action now in use, and from thenceforth the bond was, as in the present case, taken payable to the creditors who should be found to have right by the decree of ranking; thereby *non valentia* was created as to the creditors until that decree should be pronounced. But on the other hand, the same statute, 23 Geo. III. cap. 18, allowed the purchaser to protect himself by consigning his purchase money. No doubt, the statute likewise conferred the privilege upon the creditors of requiring the purchaser to make consignation, and this has been continued by 54 Geo. III. cap. 137; but there is no power given to the creditors to enforce the bond by consignation, they have merely a right to move the Court upon intimation, that all parties may have an opportunity to object; this is but a privilege to be resorted to in case of need, *res meræ facultatis*, which is not subject to prescription. If the two original actions of sale and mutiplepoinding had remained separate, the creditors, if the pursuer of the multiplepoinding had been *vergens ad inopiam*,

might have applied for consignation of the fund *in medio*, but had they not done so, he could never have pleaded prescription, no matter how long the period before conclusion of the competition. The statute 23 Geo. III. truly did no more than extend this right of the creditor.

The common agent in the ranking and sale, whose duty it is to represent the creditors, died in the year 1806; from that period until 1836, when a new common-agent was appointed, the creditors could not act as a class, but had individual rights, which might or might not be identical; and necessarily, in a large body of creditors, some of them may have been minors, or otherwise incapacitated from prosecuting their right. The *laches* of the adult creditors can never bind the minor creditors, or those otherwise incapable of protecting their interests.

Lord Advocate (*Rutherfurd*) *and Mr Stuart for respondents.*— In Middleton *v.* Falconer, the term of payment was the decree of preference, and was therefore indefinite, and conditional on the decree of preference; here the term of payment was expressly Martinmas, 1792, and the bond is no part of the process of ranking as a depending process; it was a step in the separate process of sale, and was, together with the decree of sale, transmitted to the keeper of the records, with whom it has since remained. The bond, therefore, was one which should have been "followed," or upon which action should have been pursued within forty years, otherwise it prescribed by the acts 1469, cap. 29, 1474, cap. 74, and 1617, cap. 12. The form of a precise term of payment was introduced in consequence of the 7th sec. of 33 Geo. III. cap. 74. If the creditors were not in a situation to demand payment at the term fixed, they had at least the power under 23 Geo. III. cap. 18, and also under 33 Geo. III. cap. 74, to have required consignation of the purchase-money, immediately after Martinmas, 1792; and it was with the view of giving them this power, that

the fixed term of payment was introduced, although the parties entitled might not then be ascertained.

No change has occurred in the situation of the creditors from what it was in 1792; no decree of preference is yet pronounced, and therefore the present proceeding is the best answer to the plea of *non valentia*. The original petition is not for payment, but for consignation, and might have been presented at any time since 1792. A party cannot found on a *non valentia* arising from his own default.

So soon as the term of Martinmas, 1792, arrived, the creditors acquired a right to demand consignation; a right which, in its consequences to the debtor, was equivalent to a right to demand payment; and equally with it the subject of prescription, as has been found in similar cases, Porterfield, *Mor.* 10,698; Pollock, *Mor.* 10,702. Whatever uncertainty there might be as to the ultimate right to payment, this formed no bar to interrupting prescription, Campbell *v.* Breadalbane, *Mor.* 11,275, and 6554, where prescription was held to have been interrupted by actior at the instance of a party whose title was ultimately set aside.

It is not the common agent's duty to enforce consignation; the power is given to the creditors individually; and even if it were otherwise, from 1792 till 1806 there was a common agent, and after that period it was in the power of the creditors at any time to have had a new common agent appointed.

As to the minority of some of the creditors, a party can only found on his own minority. But there is no evidence of the minority of any creditor, and at any rate, if a plea of this kind will bar prescription, it is evident that prescription can never apply to the case, for in a large body of creditors, there will in all likelihood be always some one in minority; but the creditors had a common interest in requiring consignation, which, if made on the motion of one, would have benefited the whole. The case is similar to that of substitutes of entail, where the minority of sub-

stitutes does not bar prescription, if, during the prescriptive period, there have been heirs in majority. The deduction of minorities, therefore, has no application, Kinloch, *Mor. App. Voce* Prescription, Nos. 4 and 7. See Clark *v.* Home, *Mor.* 10,662, referred to by Stuart; Middleton *v.* Falconer, *ut supra.*

Mr Pemberton, in reply.—The application is not founded on the bond, but is a proceeding in the separate process of ranking; prescription, therefore, cannot apply. The statutes do not make it necessary to take any bond from the purchaser — this may be dispensed with; had it been so, would this application have been barred? if not, the bond cannot make any difference. The appellants are merely availing themselves of a statutory provision.

[*Lord Chancellor Cottenham.* — Suppose the lands had remained in the purchasers, would the lands have been discharged of the price?

Lord Advocate. — Yes. If they got a charter, they would have had a simple unqualified right.]

No doubt.

[*Lord Chancellor.* — Could the purchaser have got a charter, when the decree adjudges the lands "upon payment or consigna- "tion?"]

Though the purchaser had obtained a charter, he never could have retained possession without either payment or consignation, whatever might be the case of a third party not having notice.

LORD COTTENHAM. — My Lords, In this case, I think the judgment of the Court of Session ought to be affirmed, and I think the grounds upon which it ought to be supported are perfectly clear. It would therefore be unnecessary to advert to other questions, which may arise upon the same matter in some other form of proceeding, were it not proper to guard against

any inference, that such other questions are concluded by the judgment in this case.

The sum in question, is the purchase-money of property sold under an order in an action of ranking and sale, and the bond dated in June, 1792, which is in the now usual form, is for payment at Martinmas, 1792, with interest from Martinmas, 1791, so long as the same shall remain unpaid to those who shall be found to have right thereto by the decreet of ranking and scheme of division.

The present demand was made by a petition in the name of Clementina Dickson, described as the only child and representative of Mrs Elizabeth Allen, and Alexander Allen, which stated, that the original summons of ranking and sale was brought at the instance of Patrick Copland, as trustee for the same Elizabeth Allen and Alexander Allen. That there had been no proceedings after 1804 or 1805, but that some of the parties having died, and their representatives being minors, the process had been allowed to fall asleep, and had been only lately revived by a summons of wakening and transference at the instance of the petitioner, Clementina Dickson. Other creditors joined as petitioners, but there is no statement or evidence as to the time at which the original pursuers died, or when the petitioner, Clementina Dickson, first represented them, or of any incapacity from infancy, or otherwise, in the parties entitled to prosecute the suit, or indeed of any of the parties interested as creditors.

The right of the parties to the fund has not been found or declared, the claim therefore is not made by them as persons in the terms of the bond, who have been found to have right to the purchase-money in question, by a decreet of ranking and scheme of division, but under the provision of the act 54 Geo. III. chapter 137, section 6, which enacts, that the Court of Session, upon the application of any of the creditors, shall be empowered to make an order on the purchaser to lodge the price

and interest, sufficient intimation being always previously given both to the purchaser and the common agent for the creditors, that such application is made, in order that all parties may have an opportunity to object. All the purchasers whose purchase-money is claimed by the petition are stated in the petition to be dead, and the claim is against their representatives. There is no question as to any claim upon the land sold, which is not proved to have been derived by these representatives from the purchasers, and of which they are stated to have had possession in the year 1792, and there is no statement or proof of any acknowledgement of liability, for the purchase-money claimed, by any of the purchasers or their representatives, or indeed of any demand having been made.

The representatives of the purchasers having, under the provisions of the act, had intimation of the application, "that they might have an opportunity to object," have objected and do object, that under these circumstances, no order ought to be made for the payment required, and they refer to the acts upon which the negative prescription of forty years is founded, by the first of which in 1469, chapter 29, it is provided, that the parties to whom the obligation is made, shall follow the said obligation within forty years, and take document thereupon, and if they do not, it shall be prescribed and be of none avail; and by the second of which, in 1474, chapter 54, it is enacted, that in time to come, all obligations that be not followed within forty years, shall prescribe and be of none avail. The statute of 1617, chapter 12, does not alter these provisions.

Much of the discussion in the papers and at the bar, proceeded upon the assumption that the present demand was upon the bonds, and the questions made were, whether these bonds are within the statute giving the negative prescription; and if so whether the parties against whom the claim was so made, are not precluded from the benefit of those statutes, upon the principle of *non*

valentia agendi, founded upon some supposed incapacity in the parties claiming, and much learning and industry were exhausted in discussing the law upon these subjects. There appears to me to be a considerable want of accuracy and precision in this view of the case, but being very clearly of opinion that the petitioners ought not to have succeeded in their application upon any view of the case, it will be unnecessary to observe upon these subjects in detail.

If the application be founded upon the bonds, then, as the parties to whom the money is made payable by the bonds have not been ascertained, and are not the parties applying, the parties who do apply must shew that they are entitled to enforce the obligation, which they can only be if the act of the 54th of Geo. III. chapter 137, gives them that right; but if they were entitled to put these bonds in force, they must be subject to the law of negative prescription, as protecting the obligors in the bonds against all who may enforce them. More than forty years elapsed between the time at which the bond was payable, and the time at which the petition was presented; the negative prescription therefore, must operate against the parties seeking to enforce the payment of the bond by means of this petition, unless some case of *non valentia* is proved to exist, but as to these petitioners, no such case is stated or proved. The action, indeed, was permitted to sleep for many years, but they might at any time have caused it to be awakened. The common agent died, but they might at any time have procured the appointment of another, and, for any thing that appears, the application now made might have been made by the same parties as those they represent at any time since 1792, when the bonds became due. The fact of the parties entitled not having been ascertained, did not create any *non valentia agendi* to these parties. Whether any of the other creditors were, during any part of this time, under any incapacity, does not appear, and is, as I conceive, perfectly immaterial. But if it

be said, that the claim by this petition is not under the bonds, the parties entitled to enforce which have not been ascertained, but under the act the 54th of George III. chapter 137, for payment of the purchase-money as such, and therefore, that the negative prescription does not apply; the answer is obvious, that the Court, in the exercise of the discretion which the act gives, ought not to order payment of the purchase-money upon the application of parties, who, on account of the negative prescription, could not have enforced the bonds.

In this country, before a late act, the 3d and 4th of William the IV. chap. 42, sect. 3, there was no statute of limitations, preventing an obligor from suing upon a bond of more than twenty years' standing, but the Courts held the lapse of twenty years unexplained as affording presumption of payment. So our Courts of Equity, in the exercise of their large discretion, assumed the period which the law had fixed for the limitation of legal demands as their guide in the administration of equity.

I pass over all that part of the case which applies to the supposed evidence of payment, as immaterial. When a time is fixed by statute, or by a rule of any Court, as a bar to any demand, the object is to avoid the necessity of going into such evidence, and to do justice in cases in which it may not be produceable, it being assumed, as the fact no doubt is, that when a demand has not been made for a great length of time, there is more danger of doing injustice, in compelling payment, than in refusing to do so.

I have been anxious to explain my reasons for affirming the judgment of the Court of Session, and of stating the extent to which I concur in the reason given for it, because without due precision upon that point, the decision of the House might be supposed to establish a doctrine fatal to the claims of others, who are not, and cannot be parties to this discussion. In the view I take of this case, it is not necessary to express any opinion upon

the case of Middleton v. Faulkner, in the 5th volume of Brown' Supplement, page 820, or as to how far the act of the 54th c George the III. chap. 137, may have affected the law there lai down, those who may hereafter establish claims, and who in th terms of the bonds shall be found to have right thereto, by th decreet of ranking and scheme of division, will be entitled, if the can, to distinguish their cases from the present. It is sufficien for the present purpose, that the parties appellant have failed t shew that they are entitled to what they ask.

I move your Lordships that the interlocutor appealed from be affirmed with costs. The Judges all expressed doubts in th first instance, they all gave very decided opinions when the finally decided the case, and I see nothing to induce the Hou to depart from what I think a most wholesome practice, admitting as few exceptions as possible to the rule of making a unsuccessful appellant pay the costs of the appeal.

Ordered and Adjudged, That the petition and appeal be dismiss this House, and that the interlocutor therein complained of, be affirm with costs.

RICHARDSON and CONNELL — HAY and LAW, Agents.

[Heard, 6*th May*, 1841.—Judgment, 8*th March*, 1842.]

The Scottish Union Insurance Company, Appellants.

John, Marquis and Earl of Queensberry, and others, Trustees and Executors of Charles, Marquis of Queensberry, deceased, Respondents.

Proof.—It is competent for a Court exercising equitable powers, to receive evidence to shew that a written contract, purporting to be an absolute conveyance, was intended as a security only, and to deal with it accordingly.

Sale.—*Security.*—Contract held to amount to a security only, and not to a sale out and out.

Early in the year 1829, Charles, Marquis of Queensberry, submitted to the Scottish Union Insurance Company a proposal, which, after shewing the encumbrances already affecting his lordship's estates, continued thus:—"After thus disposing of "the preferable heritable debt, there will remain to be provided "for, the existing annuities upon personal bond, which, exclu- "sive of L.300, payable to the Marquis's three sisters, amount "to L.1018; and likewise the sum of L.30,000, now to be "borrowed, for paying off the postponed debts. In the suppo- "sition that the annuitants, holding the personal bonds, will "accept of such a personal guarantee as the Marquis may be "able to procure, his lordship now offers to grant an heritable "bond of annuity over the barony of Kinmount, in security of "the premium and interest on the sum of L.30,000, now to be "borrowed. The existing policies of insurance, which were "effected some years ago, amount to L.26,000; the annual

" premium of which is L.1100. These policies will be assigned " in security of the loan, if it amounts to L.26,000; and if to " L.30,000, additional insurances, to the value of L.4000, will " be effected with the Scottish Union Company. If L.26,000 " only shall be given in one sum, it will be understood that the " remaining L.4000 will rank *pari passu* with it. This pro- " posal is made to the Committee of the Scottish Union Insu- " rance Company, with a request that they will take it into " consideration, and state, as soon as convenient, whether or " not they will accept of it. Lord Queensberry has been " informed that one of the first insurance companies in London " has come to the resolution of appropriating a large sum to be " lent on heritable security in Scotland; and that they are to " give money on annuity at five, and by way of ordinary loan on " good landed security, at three and a half per cent. Lord " Queensberry is desirous to know at what rate the Scottish " Union Insurance Company will transact with him."

On the 23d February, 1829, Messrs Deuchar and Knox, the solicitors of the Company, wrote Mr Stewart, the law agent of the Marquis, in these terms: —

" Dear Sir, — As we formerly intimated to you, the Scottish " Union Insurance Company have agreed to advance the " Marquis of Queensberry L.30,000 on annuity, on the " security of the barony of Kininmonth, as stated in your last " proposal.

" The rate will be six per cent, which is the lowest at which " any transactions of this nature have been entered into for " some time past; and, in addition to the security afforded by " the lands, it will be necessary that Mr Paul grant an obliga- " tion for the regular payment of the annuity while he continues " trustee for Lord Queensberry.

" As mentioned by Mr Paul, it will also be necessary, that, in " the event of a committee of the principal heritable creditors

" being appointed to advise with the trustee, that one on behalf " of the Scottish Union be included in this number."

Mr Stewart, on the 25th February, 1829, answered this letter as follows: — " Dear Sirs, — I am favoured with your letter of the " 23d inst. intimating that the Scottish Union Insurance Com- " pany have agreed to advance to the Marquis of Queensberry " L.30,000 on annuity, on the security of the barony of " Kinmount. I have now to say, in reply, that Lord Queens- " berry accepts the proposal. Should his Lordship hereafter " find that the money can be obtained at a lower rate than six " per cent, he trusts that the company will give a corresponding " abatement, and save him the expense of an assignation to the " bond."

Thereafter, the draft of an assignation by Paul, who was trustee for the creditors of the Marquis of Queensberry, was prepared by the solicitors of the Insurance Company, and sent to Mr Stewart. That draft set forth a variety of existing policies of insurance on the life of the Marquis, for sums amounting to L.26,000, granted by different insurance companies to Selkrig, as trustee for his Lordship's creditors; and that Selkrig had assigned these policies to Paul, and then proceeded in these terms: — " And seeing that the said several policies are " presently in force, the premiums of insurance having been " paid up to the several dates at which the same are due, during " the present year, and that Francis Howden, James Spittal, " James Hotchkis, and Francis Brodie, Esquires, all residing in " Edinburgh, and Thomas Kinnear, Esquire, residing in London, " trustees for, and in name and behalf of, the whole partners " for the time being of the Scottish Union Insurance Company, " have instantly made payment to me of the sum of one pound " sterling, for, and as the consideration of, my granting the " assignation underwritten: Therefore I, the said William " Paul, as acting trustee aforesaid, with the consent of the said

" Charles Marquis of Queensberry, and I, the said Charles " Marquis of Queensberry, for all right and interest I have in " and to the policies of insurance above mentioned, do, by these " presents, fully and absolutely assign, convey, and make over " to and in favour of the said Francis Howden, James Spittal, " James Hotchkis, Francis Brodie, and Thomas Kinnear, as " trustees for the use, benefit, and behoof of the whole partners " of the said Scottish Union Insurance Company, present and " future, without regard to any change that shall or may take " place in the persons composing the said Company, and to the " survivors or survivor of the said trustees, and their or his " assignees or assignee, and to the succesors in office of the said " trustees, and the survivors and survivor of them, or their or his " assignees or assignee, excluding all the heirs and other repre- " sentatives of the said trustees, and declaring, that any two of " the said trustees acting for the time, shall be a quorum, while " two or more of them are alive, and that the survivor shall be " entitled to act in case of the decease of all the rest, as well the " said certificates or policies of insurance themselves, as all right " and interest which I, as acting trustee aforesaid, have in and " to the same, or in or to any claim, advantage, or benefit, " which may arise thereby, in any manner of way, with full " power to the said trustees before named, and their foresaids, to " receive the whole sums which may become due by or under " the said certificates or policies of insurance, and to discharge " and convey the same in the same manner, and as fully and " freely in all respects as I could have done before granting " hereof: Which assignation, I, as acting trustee, and with con- " sent foresaid, bind and oblige myself and my foresaids, to " warrant to all concerned, from all facts and deeds done or to " be done by me in prejudice hereof, and having herewith " delivered up to the said trustees the foresaid certificates or " policies of insurance, with the assignation by the said Charles

" Selkrig in favour of the said John Douglas and me, to be used " by them as their own proper writs and evidents, I, as acting " trustee, and with consent foresaid, consent," &c.

On the 18th November, 1829, Mr Stewart returned this draft to the solicitors of the company with a letter in these terms: —

" Dear Sir, — I return the draft-assignation by Mr Paul, re- " vised. It seems to me to be right. But there is a condition which " must be expressed either in it or in the bond of annuity, *i. e.* that " the Scottish Union shall be bound to re-convey the policies in " the event of the annuity being redeemed. This, of course, is " fair and reasonable, and consistent with our understanding."

In January, 1830, the Scottish Insurance Company paid over to Paul L.29,980. They received in exchange the foregoing assignation, and an assignation to another policy for L.3000. They effected insurance upon the Marquis's life for L.1000, and they also obtained from the Marquis an heritable bond for an annuity of L.3090.

At the time of settling the transaction, the following state was prepared by the Scottish Union Company, and the subjoined receipt was granted by them for the amount of the deductions in the state: —

State relative to the Loan by the Scottish Union Insurance Company to the Marquis of Queensberry, shewing the sum repaid to them when the advance was made on 13th January, 1830.

Interest on L.30,000, at 5 per cent. from 1st August, 1829, to 13th January, 1830, or 165 days, ...		L.678 1 7
Deduct Bank Interest on L.29,000, at two and a half per cent. from 1st August, 1829, to 27th November, 1829, or 118 days,	L.234 7 8	
Bank Interest on L.18,700, at two and a half per cent. from 27th		
Carried forward,		L.678 1 7

Brought forward,		L.678	1
November, 1829, to 13th January, 1830, or 47 days, . .	60 7 2		
		294	14 1
Balance of Interest, .		L.383	6
Proportion of Premium on Scottish Union Policy paying L.131 per annum, from 17th February, 1830, to 13th January, 1831, or 340 days,		122	0
Proportion of Premium on Eagle Policy, paying L.92, 6s. 8d. per annum, from 10th June, 1830, to 13th January, 1831, or 217 days, .		54	17
Do. on Hope Policy, paying L.184, 3s. 4d. per annum, from 24th June, 1830, to 13th January, 1831, or 203 days, . . .		102	8
Do. on Imperial Policy, paying L.136 per annum, from 24th July, 1830, to 13th January, 1831, or 173 days, ...		64	9
Do. on Scottish Widows' Fund Policy, paying L.44, 2s. 6d per annum, from 24th July, 1830, to 13th January ,1831, or 173 days, . .		20	18
Do. on Albion Policy, paying L.226, 13s. 4d. per annum, from 16th August, 1830, to 13th January, 1831, or 150 days, . . .		93	3
Proportion on Rock Policy, paying L.226, 13s. 4d. per annum, from 31st August, 1830, to 30th January, 1831, or 135 days, . .		83	16
Do. of Premium on Pelican Policy, paying L.200, 8s. 4d. per annum, from 3d September, to 13th January, 1830, or 132 days, .		72	9
Do. on Palladium Policy, (to be effected) for L.1000, paying L. 49, 15s. 10d. per annum, with L.3 stamp, ...		52	15 1
		L.1050	6

SCOTTISH UNION OFFICE,
Edinburgh, 19th January, 1830.

Received from William Paul, Esq. One Thousand and Fifty Pounds, Six Shillings, being Life Premiums and Interest, as per annexed Statement of the Marquis of Queensberry's annuity.

(Signed) SUTHD. MACKENZIE, *Manager*.

The heritable bond of annuity bore to be in consideration of the Company having "instantly advanced and paid to me, the "said William Paul, as trustee foresaid for the said Marquis, "and for the special purposes of the said trust, the principal sum "of twenty-nine thousand nine hundred and eighty pounds ster- "ling;" and after specifying the terms of payment of the annuity, continued thus: — "And also that I, the said Marquis, shall not "at any time, so long as the said annuity shall continue payable, "go on the seas, or into parts beyond, and shall not enter into "the army or navy, without giving to the said trustees or their "foresaids, one month's notice thereof; and in case they, the "said trustees or their foresaids, shall have previously insured, or "shall insure any sum or sums of money, not exceeding twenty- "nine thousand nine hundred and eighty pounds sterling, on "the life of me, the said Marquis, or shall have acquired right "to any policies of insurance on my life, not exceeding said "amount, and shall pay any additional premium or premiums of "insurance, on account of my going on the seas, or into parts "beyond, or on account of my entering into the army or navy, "as aforesaid, then I, the said Marquis, and I, the said William "Paul, as trustee aforesaid, hereby bind and oblige ourselves, "and our respective foresaids, that we shall well and truly pay "to the said trustees, or their foresaids, the amount of such addi- "tional premium or premiums of insurance, as they shall from "time to time pay, in consequence of me, the said Marquis, "going on the sea, or into parts beyond, or of entering into the

" army or navy, as aforesaid, to any office or offices, or under-
" writer or underwriters, in case of their insuring with such, or
" as shall be due to the said trustees, in case of their taking the
" insurance upon themselves, or which they would be entitled to
" demand from any other person or persons insuring my life with
" them according to their rates of insurance in similar cases, by
" the practice of their office for the time being; and I, the said
" Marquis, and I, the said William Paul, as trustee aforesaid,
" do hereby, for ourselves and our respective foresaids, covenant,
" promise, and agree, and bind and oblige ourselves and our
" foresaids, that if I, the said Marquis, shall at any time or
" times, while the said annuity or yearly sum, or any part thereof,
" shall continue payable, go on the seas, or into parts beyond, or
" enter into the army or navy, without giving notice, as afore-
" said, to the said trustees, or their foresaids, and in conse-
" quence thereof, or of any other act or deed to be made, done,
" or committed, executed, omitted, permitted, or suffered by
" me, the insurance or insurances effected, or to be effected by
" the said trustees, or their foresaids, on my life, or any policies
" of insurance to which they have acquired, or shall acquire
" right to the extent foresaid, shall become void and null, or
" shall in any manner of way be prejudiced or affected, then,
" and in that case, I, the said Marquis, and I, the said William
" Paul, as trustee aforesaid, do hereby bind and oblige ourselves,
" and our respective foresaids, on demand, well and truly to pay
" to the said trustees, or their foresaids, all the sums of money,
" losses, damages, costs, charges, and expenses, which they, the
" said trustees, or their foresaids, shall sustain, suffer, or incur, by
" reason of me, the said Marquis so going abroad, or entering
" into the army or navy, or doing, or omitting, or permitting,
" any such other deed as is herein before-mentioned, with the
" lawful interest for the money which shall be so paid, and of
" the amount of the losses, damages, costs, charges, and expenses

" which shall be sustained and incurred as aforesaid. Declaring " always, as it is hereby specially provided, declared, and agreed " upon, that the said annuity or yearly sum is, and shall be re- " deemable and subject to re-purchase by me, the said Marquis, " or by me, the said William Paul, as trustee aforesaid, or those " deriving right from us, in the manner, at the time, and by pay- " ment of the money as hereinafter specified." (*Here followed an obligation to infeft in lands specified in security of the annuity.* " And with and under this other provision and declaration, as it " is hereby expressly provided and declared, that the said annuity, " or clear yearly sum of three thousand and ninety pounds ster- " ling, and the lands and others out of which the same is pay- " able, are, and shall be redeemable and subject to repurchase " from the said trustees or their foresaids, by me, the said Mar- " quis, and me, the said William Paul, as trustee aforesaid, or " those in our right, at the term of Candlemas, 1831, or at " any term of Candlemas thereafter, (upon lawful premonition " sixty days at least previous to the said term of Candlemas, at " which the same is to be redeemed,) by making payment to the " said trustees or their foresaids, of the said principal sum of " twenty-nine thousand nine hundred and eighty pounds ster- " ling, and whole arrears of the said annuity, which shall be due " and owing at the time, and interest thereof, and corresponding " liquidate penalty, if, and in so far as, the same shall be incurred, " together with all necessary costs and charges legally and rea- " sonably incurred, and due at the time, in recovering the said " annuity when in arrear, or in any way in relation thereto; " such notice of redemption to be given to the said trustees or " their foresaids, at the Head Office of the said Scottish Union " Insurance Company, in the city of Edinburgh; or if the said " annuity shall be assigned, then, by giving intimation to the per- " son or persons in right thereof for the time, in the usual form " in writing, before a notary public and witnesses, * * * *

" * * and upon making such payment and redemption, the " person or persons in right of the said annuity at the time o " redemption or repurchase, shall be bound, in due form of law " to renounce or convey the said annuity or yearly sum for the " time subsequent, together with the security for the same; and " the said trustees agree, and bind and oblige themselves and " their foresaids, to discharge or convey the same accordingly."

The annuity given by this bond was understood to be in payment of interest on the money advanced by the Insurance Company, after discharge of the premiums on the different policies.

The addition suggested in Mr Stewart's letter of 18th November, 1829, was not made to the assignation; but on the 10th June, 1830, the solicitors of the Scottish Union Insurance wrote a letter to Paul in these terms, — " SIR, — As in entering into " the annuity transaction betwixt the Scottish Union Insurance " Company, and the Marquis of Queensberry, and you, as his " trustee, it was stipulated, that the Policies of Insurance should " on redemption of the annuity, be reconveyed to the Marquis, " or to any party named by him or you, — We, as acting for " the Scottish Union Company, hereby declare this to have been " the understanding, and bind the Company to assign the Poli- " cies of Insurance held by them at the date of redemption of " the annuity. — We are," &c.

On the 15th May, 1832, Paul wrote to Mr Mackenzie, the secretary of the Scottish Union Company, in these terms, — " I " beg leave to mention to you, that I have an offer of a loan on " account of the Marquis of Queensberry, on a transfer to the " security held by you, and an assignation to the policies of in- " surance, at five and a half per cent. I am unwilling to enter- " tain the offer, provided you will agree to a reduction of the " rate of annuity to that extent; for although the changing of " the creditor will be attended with some expense, yet the saving " on the long run will be considerable to his Lordship; and if

"you find that you cannot lower the rate of annuity, I shall be "obliged to accept the proposal that has been made to me. I "shall feel obliged by your informing me, so soon as conve- "nient, whether you can comply with my wishes." On the 23d of May, Mr Mackenzie answered, — "DEAR SIR, — In reply "to your letter of the 15th instant, I have to acquaint you, that "at the term of Candlemas next, this Company will make an "abatement of one half per cent. on the rate of annuity then "payable by the Marquis of Queensberry, provided the rate of "interest in the money market remains nearly in its present "state; and the same abatement shall be continued at each "succeeding term of Lammas and Candlemas, so long as no "advance in the market rate of interest takes place. I trust "this will be satisfactory to you; but I have to remind you that "the annuity by the bond is redeemable only at a term of "Candlemas, upon sixty days' premonition. — I remain," &c.

On the 13th of July, Paul wrote Mackenzie thus, — "In re- "ference to your letter to me of 23d May, relative to the rate "of interest on the loan from the Scottish Union Insurance "Company to the Marquis of Queensberry, I beg leave to say, "that as acting trustee for his Lordship, I accept of your offer "for the lender, of one half per cent on the rate of annuity "payable at Candlemas next, and of the same abatement at the "succeeding Lammas; but I am of opinion, that the rule by "which the rate of interest is to be regulated, must be more "definite than what you state; for to make it depend generally "on 'the rate of interest in the money market,' seems to me to "be too vague a criterion, as opinions may differ as to what that "rate is. I would propose, in place of this, that the half per "cent abatement should be allowed, provided the Bank of Scot- "land, Royal Bank, and British Linen Company are, at the "date of 60 days before Candlemas, discounting at four per cent. "Let me know if your Board agree to this. — I am," &c.

Communications, similar to the preceding, occurr
course of the years 1835 and 1836.

The Marquis of Queensberry died on 3d December,

The policies which had been assigned by Paul to th
Union Insurance Company, had been granted some o
proprietary offices with a subscribed capital, which to
company the whole benefit of the premiums, while o
been granted by mutual assurance companies without
scribed capital, but which accumulated the premiums
for division at specified periods, between the company
assured. Upon these latter policies the *bonus*, or sha
divisible fund which the holders were entitled to receive,
to about L.1200. On the other hand, the moneys paya
the policies were not payable as to some of them u
months after the death of the Marquis, and as to o
until six months after that event.

The Scottish Union Insurance Company claimed tc
whole moneys payable under the policies, and likewise tl
which have been mentioned. In consequence, the exec
trustees of the Marquis brought an action to have the Scot
Company ordained to account with them for the money
or which might be received, under the policies, whethe
or otherwise, over L.29,980. A record was made up,
after the Lord Ordinary (Cockburn) ordered cases, upo
which he pronounced the following interlocutor, on 6
1839: —

"The Lord Ordinary reports these cases to the Co
"because he considers the question as attended with co
"difficulty, but chiefly on account of its novelty, bo
"being agreed that no such case has ever occurred he

On the 10th July, 1839, the Court pronounced the
interlocutor:—"The Lords having advised this cause, wit
"for the parties, and heard counsel, Find, that the def

"bound to account for, and make payment to the pursuers of the "*Bonus*, or profits claimed, in terms of the conclusions of the "libel, and remit to the Lord Ordinary to ascertain the amount "thereof; but find no expenses due."

Against this interlocutor the appeal was taken.

Lord Advocate and Mr Pemberton, for appellants. — The transaction between the parties was simply a purchase of an annuity terminable with the life of the Marquis. With his life, the annuity ceased, and then there was nothing capable of redemption. To protect themselves against the loss which the appellants would have sustained by this event, they might have effected insurance on the life of the Marquis; but there being policies already existing it was part of the transaction, that they should have the benefit of these, the premiums payable upon them being lower than those upon which a new policy could have been effected. They accordingly took an assignation to the policies in question; but that assignation was absolute in its terms, and did not impose upon them any obligation; although forming part of the transaction, it no way altered its nature. There was no stipulation of any annual payments as interest upon money advanced, or any thing to give the transaction any other character than that of a purchase. It was in the option of the appellants, either to have kept up the policies, or to have let them drop, and become their own insurers. If they did keep them up, they did so for their own benefit, and at their own risk. Had any of the insurance companies been unable to pay, or had they refused to do so under any of the provisoes in the policy, the loss would have fallen on the appellants, without any recourse against the respondents. As they must have borne any loss that might have arisen, so must they be entitled to the profit which has accrued. Courtney *v.* Ferrers; 1 *Sim.* 137. And this profit will do little more than reimburse the appellants for

the loss of interest sustained by the interval between the death of the Marquis and the time at which the policies were payable.

The Court below has held the transaction to amount to a loan, and a resulting trust to be in the appellants, for the benefit of the respondents. They admit, however, that the deeds do not shew this; but they reform the deeds, and in so doing, they taint with usury, and make illegal, a contract which was otherwise perfectly legal. If the transaction were a loan, there was no risk which could authorize the taking of more than the legal rate of interest; but the deeds negative this, and shew the transaction was merely the purchase of a redeemable annuity, and not a loan; Graham *v.* Child, 1 *Bro.* 93. If the appellants had allowed the policies to fall, and the Marquis had lived such a length of time, as that the excess of the annuity over the legal rate of interest, which was attributable to the premium of insurance, had amounted to a greater sum than the L.29,980, could the respondents, or the Marquis, in his lifetime, have required the appellants to pay themselves only the L.29,980 and interest, and account for the balance? If they could not, it is difficult to see on what principle the respondents can have any interest in the policies, which have been kept up with the fund out of which such accumulation would have arisen.

The contract between the parties was, that so soon as the annuity should be redeemed, the appellants should reassign; but in that case the annuity must have been paid up to the actual day of redemption. The claim of the respondents, however, is, to have a re-assignment, without any redemption having taken place, or being now capable of taking place, and that without paying any part of the annuity during the three or six months, as to which the appellants received neither annuity nor interest.

Mr K. Bruce, and Mr John Stuart for respondents, — We admit, that in form the transaction in question was the purchase of an annuity, but in substance it was neither more nor less than

a loan upon security. This is shewn by the original proposal, and the subsequent correspondence in regard to reduction, in the rate of the annuity. The premiums of insurance remained a fixed burden on the Marquis's estate; but that part of the annuity which exceeded the amount of the premiums, was negotiated for as interest, and like interest, was made to fluctuate according to the price of money in the market.

The proposal was, that the policies should be "assigned in "security of the loan," and Stewart's letter of 18th November, 1829, and the letter from the solicitors of the respondents of 10th June, 1830, recognized this, and formed a contract by the appellants, to reassign the policies on redemption of the annuity. Coupling this with the fact that part of the annuity was plainly applicable to keeping up the policies, the policies were in truth to be maintained out of the estate of the Marquis, and it was not optional with the appellants to let them drop or keep them up. Had they let them drop, and the Marquis at a much later period had redeemed the annuity, how could they, in such a case, have reassigned the policies according to their agreement? and if they could not have reassigned, would they not have been liable to make good the loss which would have accrued to the Marquis, by the increased rate of premium he would have had to pay on opening fresh policies?

To make out that the appellants had a discretion as to the policies, they must establish an absolute purchase; but the whole transaction negatives such a position. In addition to the evidence already adverted to, as shewing that the policies were merely assigned as a security, there is the fact shewn upon the face of the assignation, that only one pound was paid as the consideration; while it is evident, that the policies, on which several years had already run, must even at that time have been of considerable value, and, with the *bonuses* then due, exceeding the amount of the sum advanced by the appellants. As to any risk in regard to the

dropping of the policies, through any act of the Marquis, that was provided for by the bond of annuity, in stipulations which plainly contemplated the keeping up of the policies. Upon the whole, there is a resulting trust for the respondents, upon the assignation as given for a nominal consideration, and the Court below has done right in holding that the appellants must account for the surplus after reimbursing themselves their advances.

LORD COTTENHAM. — My Lords, this is stated to be a case of novelty in Scotland. The principles applicable to it are very familiar in the Courts of Equity in this country, and fully support the interlocutor of the Court of Session. If it were not competent for a Court of Equity to give effect to a transaction different from what the deeds executed represented to be the character of it, one of the most important branches of its jurisdiction would be cut off, and a security would be afforded to frauds which are now easily detected and defeated. Of the instances in which equity exercises this jurisdiction, there is none better established than the practice, upon proper proof of the intention of the parties, of treating an absolute conveyance as a security only, and attaching, to what appears upon the face of the deeds to be an absolute sale, the liability to redemption. The only question is, the intention of the parties, and of that, in the present case, I cannot find any room for doubt.

The transaction itself is one of very frequent occurrence in this country, and is known by the somewhat inconsistent term of borrowing upon annuity, a plan sometimes resorted to for the purpose of giving to the lender a larger interest than he could otherwise receive, but more frequently, as the only means by which a tenant for life can secure to the lender a return of the money lent. To attain this object, the tenant for life, in addition to the amount of interest agreed to be paid upon the money advanced, pays such farther sum as is equal to the premium of a

policy for the life of the borrower, of the same amount as the money advanced, the whole being reserved and secured in the form of an annuity. If the transaction end here, the party who advances the money may either effect a policy to the amount of the money advanced, or he may become his own insurer, by merely receiving the excess of the annual payment beyond the interest agreed upon. In that case, the party to whom the advance is made has nothing to do with the policy, if effected. It is exclusively the property of the person who advances the money, and effects the policy, and pays the premium. But if it be part of the contract, that the party receiving the money shall assign to the party advancing it existing policies upon his life, which, being of some standing, must be of some value, and an absolute assignment takes place accordingly, a question may arise, whether such assignment was intended to inure for all purposes for the benefit of the assignee, or whether it was intended only as a means of restoring to him a return of the principal money advanced. And in ascertaining such intention, it is competent for the Court to form its judgment upon the whole of the transaction, and upon evidence *dehors* the deed; such evidence being used, not for the purpose of putting a construction upon the deed, but of superadding an equity, controlling the estate and interest given by the deed. If the Court find grounds for concluding, that the assignment was made only for the purpose of securing a return of the money advanced, then, as in all other cases, the property assigned will, in equity, be considered as belonging to the assignor, subject to the assignee's title to be repaid the sum intended to be secured.

In this case, the instruments themselves go far to prove that the assignment was only as a security. The assignment is indeed absolute in form, but it shews that the policies were of some value. The first policy, indeed, was of more than ten years' standing; but the assignment is for a nominal consideration, and

the bond provides for payment of an additional annual sum, to meet the additional premium which might become payable, and provides, that the annuity and the security for the same shall be subject to redemption.

The evidence *dehors* the deeds leaves no doubt upon this subject. The proposal offers, that the existing policies, effected some years ago, should be assigned in security for the loan, and the Scottish Union Insurance Company, by their letter of the 23d of February, 1829, agreed to advance the L.30,000 on annuity, as stated in the proposal, and by their letter of the 10th of June, 1830, bind themselves to reassign the policies upon the redemption of the annuity. The receipt for the annual payment is specified to be for life premium and interest. These policies, therefore, being assigned as security only for the release of the money advanced, remained, in equity, the property of the assignor, subject only to such liability to repay the money advanced. They have, in fact, produced more; and whether that excess be little or great, can make no difference. Whatever be its amount, it is the property of the assignor, and so the Court of Session have decided.

The appellants, however, contend, that even upon this view of the transaction, the interlocutor appealed from has not given all that they are entitled to, for that as the annuity ceased upon the death of Lord Queensberry, and the sums insured were not payable till three months, and, in one instance, not till six months after that event, the interlocutor does not provide for payment to them of interest upon the money advanced during these periods. There is some plausibility in this claim, but upon examination, it cannot be supported. When the appellants advanced the L.30,000, and took in return the annuity determinable upon Lord Queensberry's death, and the assignment of the policies for the same sum of L.30,000, not payable until a certain time after that event, it must have been foreseen that they would receive no

interest upon their money for those periods. If the policies had not increased in value, it must have been so. There is, therefore, no contract for interest, and the nature of the security excludes any supposition of there having been an intention that any should be received. The consideration for the advance of the money was, the annuity during the life of Lord Queensberry, and a return of the principal by means of the policies, and by these means only, and, therefore, at such times only as those policies were payable.

I am, therefore, of opinion, that the interlocutor is altogether right, and I think the case so clear, that the appeal ought to be dismissed with costs, although one of the Judges below dissented from the judgment appealed from.

Ordered and Adjudged, that the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed, with costs.

OLIVERSON, DENBY, and LAVIE — RICHARDSON and CONNELL, Agents.

[Heard, 29*th June*, 1840.—Judgment, 15*th March*, 1842.]

SIR NORMAN LOCKHART, Baronet, *Appellant.*

The Honourable MARY JANE LOCKHART MACDONALD; and the Honourable HENRY AUGUSTUS MORETON, M.P., her Husband, for his interest; and Dame EMELIA OLIVIA MACDONALD, *Factrix loco Tutoris* for EMELIA OLIVIA LOCKHART MACDONALD, *Respondents.*

Tailzie.—Destination.— Under a destination to "heirs-male of the "body, and the heirs whatsoever of the body of the said heirs-"male," *found* that the heirs-male did not require to be exhausted, before the heirs whatsoever of the body of the first heir-male of the body could take.

ON the 17th August, 1762, John Macdonald, in the contract of marriage of his only daughter, Elizabeth, with Charles Lockhart, bound himself to settle his estate of Largie "In favours of "himself, and the heirs-male to be procreate of his body of his "present marriage, and the heirs whatsomever of the body of "the said heirs-male; whom failing, to the heirs-male to be "procreate of his body in any subsequent marriage, and the "heirs whatsomever of the body of the said heirs-male; whom "failing, to the said Mrs Elizabeth Macdonald, and the heirs-"male of her body of this present marriage, and the heirs what-"somever of the body of the said heirs-male; whom failing, to "the heirs-male of the body of the said Mrs Elizabeth Mac-"donald in any subsequent marriage, and the heirs whatsomever "of the body of the said heirs-male; whom failing, to the heirs-"female of the said Mrs Elizabeth Macdonald of this present mar-"riage; whom failing, to such other heirs as he, the said John

" Macdonald, shall think proper to nominate and appoint in the " said disposition, or in any other writing to be made and sub- " scribed by him at any time in his lifetime."

On the 5th of April, 1763, John Macdonald executed an entail of Largie in terms of the marriage-contract, which contained the following destination: — " Therefore, in implement " of the said obligation, and in exercise of the power reserved " thereby to me, I hereby sell, annailzie, and dispone, under the " reservations, provisions, conditions, powers, and faculties, and " clauses prohibitive, irritant, and resolutive underwritten, to and " in favours of myself and the heirs-male to be procreate of my " body of my present marriage with Mrs Elizabeth M'Leod, " lawful daughter of Mr John M'Leod of Muiravonside, advocate, " and the heirs whatsomever of the body of the saids heirs-male; " whom failing, to the heirs-male to be procreate of my body in " any subsequent marriage, and the heirs whatsomever of the bodys " of the saids heirs-male; whom failing, to Mrs Elizabeth Mac- " donald, my only lawful daughter, and the heirs-male of her body " of her present marriage with Mr Charles Lockhart, second law- " ful son to George Lockhart of Cairnwath, Esquire, and the " heirs whatsomever of the bodys of the saids heirs-male; whom " failing, to the heirs-male of the said Mrs Elizabeth Macdonald " in any subsequent marriage, and the heirs whatsomever of the " bodys of the saids heirs-male; whom failing, to the heirs " female of the said Mrs Elizabeth Macdonald of her present " marriage; whom failing, to such other heirs as I have nomi- " nate, or shall think proper to nominate and appoint, by any " writing already made and subscribed, or to be hereafter made " and subscribed by me, at any time in my lifetime; whom " failing, to my heirs-male whatsomever; whom all failing, to " my heirs and assignees whatsomever, all and haill my lands " and estate of Largie," &c.

And on the 15th of April, 1763, the entailer executed a deed

of nomination, giving seventeen additional substitutions of heir each of them coupled with a substitution of "the heirs-male c "the body" of the substitute, and the whole concluding in thes terms, — "which failzeing to my nearest and lawful heirs-mal "whatsomever, which failzieing to my heirs and assignees wha "somever."

The entailer died in 1771, without issue male. Upon h death, his daughter, Elizabeth, succeeded to his estate, in virtu of the destination in the entail.

By her marriage with Charles Lockhart, she had four sons,- 1. John, who predeceased his mother, without issue; 2. Jame who on his mother's death in August, 1787, succeeded to th estate of Largie, and continued in possession till the 6th of Sep tember, 1793, when he died without issue; 3. Alexander, wh on James's death succeeded to Largie, under the entail of 1763 4. Norman Lockhart, writer to the signet.

Sir Alexander, the third son, died in 1816, leaving three son and several daughters. His sons were,—1. Sir Charles Mac donald Lockhart, who succeeded him in the estates; 2. Nor man, the appellant; and, 3. Alexander Macdonald Lockhar Sir Charles died in December, 1832, without issue male, bu leaving two daughters, the respondents.

Upon the death of Sir Charles three actions of declarato were commenced in the Court of Session. 1. At the instance c Lady Macdonald Lockhart, the widow of Sir Charles, as *factri loco tutoris* for her youngest daughter, the respondent, Emeli Olivia Lockhart Macdonald, claiming that the entail of 1763 wa at an end, and that the estate of Largie belonged in fee-simple t the two sisters, as coheiresses; 2. At the instance of the elder siste the respondent, Mary Jane Lockhart Macdonald, claiming to b sole heiress of entail under the destination in the deed of 1763 3. At the instance of Norman, now Sir Norman Macdonal Lockhart, claiming that he was the preferable heir of entail.

LOCKHART v. MACDONALD, — 15th March, 1842.

These actions were conjoined; and on considering revised cases for the parties, the Lord Corehouse, Ordinary, on the 28th of June, 1836, pronounced this interlocutor: "The Lord Ordi- "nary makes *avizandum* with the revised cases for the parties, "and whole process to the Lords of the First Division, and "appoints the record and revised cases to be boxed to their "Lordships, *quam primum.*"

On the 19th of January, 1837, the Court pronounced the following interlocutor: "The Lords having advised the three "conjoined actions of declarator, Find, that the succession to "the estate of Largie, under the deed of entail thereof, descends "to the heirs whatsoever of the body of the late Sir Charles "Macdonald Lockhart, in preference to Sir Norman Macdonald "Lockhart, claiming as heir-male; and therefore sustain the "defences to the action of declarator at his instance, assoilzie "the defenders from the whole conclusions thereof, and decern; "but reserve all questions between the daughters of the said Sir "Charles Macdonald Lockhart, relative to the said succession; "and remit the process of declarator at their instance to the "Lord Ordinary, to proceed therein as shall be just."

The opinions delivered by the Judges at pronouncing this interlocutor were as follows: —

Lord Gillies. — It is certainly an odd question, at the same time a very important one for the parties; but how long is the construction which one of the parties wishes to put on the clause to last? I don't know; I certainly think, however, there is only one way of settling it, viz., by giving the clause just the common understood interpretation which would be put upon it by any one.

Lord President. — I am of the same opinion. I see no other way. It is exactly the same case with the Rothes one, which is precisely in point. I think the names of the parties were Leslie. The curious circumstance here is, that the destination carries the

property to daughters in one place, and it ends with daughters, as if they were never previously mentioned.

Lord Mackenzie. — I hold the same view with your Lordships. If the clause mean any thing, it must mean that heirs-female are to succeed. I know of no other rule of interpretation which would be good. Indeed, there is nothing in any of our styles which could authorize any other meaning to be put upon it. I certainly see no reason for preferring a lot of heirs-male, then a lot of heirs-female, and again heirs-male, and then heirs-female. I cannot arrive at that conclusion.

Lord President. — I know Lord Balgray's opinion, who is absent from illness, to coincide exactly with your Lordships, from a conversation I had with him on the subject.

The appeal was taken against the interlocutor of 19th January, 1837, with the leave of the Court. At giving that leave, one of the Judges expressed himself in these terms, — " this was under-" stood to be an amicable suit, and the Court has accordingly " not thought it requisite to give their opinions at length."

The appeal came on to be heard on the 27th August, 1839, when the following observations were made by

The Lord Chancellor, (*Cottenham.*) — My Lords, In this case, the question raised is one of pure Scotch law, upon which it does not appear that any decision has ever taken place in the Courts of Scotland. The limitation upon the marriage of the settler's daughter was to the daughter and the heirs-male of her then marriage, and the heirs whatsomever of the bodies of the said heirs-male. Alexander, a son of the marriage, succeeded to the estate in question, and to him, Sir Charles Lockhart, his son. Sir Charles Lockhart left no son, but two daughters, the respondents. Sir Norman Lockhart, another son of Alexander, and brother to Sir Charles, is the appellant; and the question is, whether, under this limitation, the daughters

the heir-male of the body succeed in preference to the next heir-male.

It unfortunately happens, that notwithstanding the novelty and difficulty of this case, we have not the benefit of the reasons upon which any of the Judges below proceeded in deciding against the appellant. Indeed there appears to have been some misapprehension as to the character of the suit, which may have led to this result; it being represented, that one of the learned Judges, upon the petition for appeal, stated that this had been understood to be an amicable suit, and that the Court had accordingly not thought it requisite to give their opinion at length.

It was stated by the Lord President, that the case was exactly the same with the Rothes case, which was precisely in point. Upon examining that case, it appears to me, that there are very essential distinctions between the two, although it certainly affords strong analogical arguments; but on the other hand, what took place in this House upon the claim to the Polwarth Peerage is entitled to the highest consideration, and does not appear to have been adverted to by any of the learned Judges below.

We are therefore called upon to decide upon the effect of certain limitations in a Scotch settlement, which seem not to be of unfrequent occurrence, but upon which there is no direct decision, but as to which two cases before this House, that is, the Rothes case and the Polwarth case, are represented as strong authorities, but on opposite sides; and yet, owing probably to the circumstance I have alluded to, the case does not seem to have received that consideration below which would no doubt, under other circumstances, have been given to it; and we have not the benefit of the grounds of the judgment of any of the learned Judges.

In such a case, this House must be desirous of having all the assistance which it can derive from the full consideration of a question of purely Scotch law by the Court of Session; and in

order to obtain that assistance, I propose that the case be remitted to the Court of Session, to be again argued before all the Judges of that Court.

It was then "Ordered and Adjudged, That the cause be "remitted back to the said First Division of the Court of "Session in Scotland, with directions to the Judges of that "Division to order the said cause to be heard before themselves and the whole of the other Judges of the Court of "Session, including the Lords Ordinary; and farther to do "therein as may be consistent with this judgment."

Under this remit the following interlocutor was pronounced by the Court below, upon the 24th January, 1840: — "The "Lords of both Divisions of the Court, and the Lords Ordinary, "having met under the remit from the House of Lords, and "heard counsel for the parties in the three conjoined actions of "declarator, adhere to the interlocutor appealed from; and "find, that the succession to the estate of Largie, under the "deed of entail thereof, descends to the heirs whatsoever of the "late Sir Charles Macdonald Lockhart, in preference to Sir "Norman Macdonald Lockhart, claiming as heir-male; and "therefore, of new sustain the defences to the action of declarator at his instance, assoilzie the defenders from the whole "conclusions thereof, and decern; reserve all questions between "the daughters of the said Sir Charles Macdonald Lockhart "and the other heirs of entail relative to the said succession; "and remit the processes of declarator at their instance to the "Lord Ordinary, to proceed therein as shall be just."

The opinions of the Judges at giving this judgment are too voluminous to be inserted here, but they will be found in 2 *D. B.* and *M.* 377.

Lord Advocate (Rutherfurd,) Sir W. Follet, and Mr Macnachie, for the appellant. — By the entail of 1763, the heirs-male

of the body of Mrs Elizabeth Macdonald by her then marriage were called as a class. It is only after failure of the whole of these heirs-male, that any heir whatsomever can take. Each heir-male is not called as a *stirps* which must be exhausted before the next can take, but the whole are called as one class; so the destination to the heirs whatsomever is to them generally, and not to the heirs whatsomever of the body of *each* heir-male respectively and successively.

[*Lord Brougham.* — To what antecedent do you refer the relative "*whom?*" Must you not refer it to the whole antecedent clause, and not to the last limb of the clause?]

We do refer it to the whole antecedent classes of heirs.

[*Lord Brougham.* — You say heirs-male of the body must be exhausted before heirs whomsoever can take?]

Yes. If the clause had been simply to Elizabeth Macdonald, and the heirs-male of her body by her then marriage, the second brother would have taken to the exclusion of the daughters of the elder brother; and if the term "whom failing," had been introduced before the "heirs whatsomever of the body," instead of the word "and," there could not have been any doubt as to the preferable right of the second brother.

[*Lord Brougham.* — That was discussed in the Polwart case.]

But in the clause as it exists, it is not the first son of the marriage that is called, and the heirs whatsomever of his body, but the heirs-male in the plural, and the heirs whatsomever of the bodies of the said heirs-male; to bring in the heirs whatsomever of each heir-male before the next heir-male can take, would in truth be to limit the construction of the term "heir-male" to "son" of the marriage, a construction which it has never received. It is sufficient to embrace a general class of heirs, and has always been received in that sense.

It is said the word "and" couples the "heirs whatsomever"

with each heir-male successively; but in doing so the term "and" necessarily receives the same effect as the words "whom failing;" or even if it be used disjunctively, still it receives the same effect. In the Polwarth Peerage case, the interpretation put upon the term "and" was, that it was equivalent to "whom failing;" so in Richardson *v.* Stewart, 1 *S.* and *D.* 105; Kerr *v.* Innes, 13th November, 1810, 13 *F. C.* 1. To give it the same interpretation here, is evidently to carry out the intention of the entailer. By the entail, heirs-male, not only of the then existing marriage, but of any future marriage, are preferred to heirs-female of the existing marriage; this is destroyed if the destination to heirs-male of the body is satisfied so soon as an heir-male takes, and the heirs whatsomever are admitted on his death; the effect in that case is to admit the heirs-female before the other heirs-male. So in the Polwarth case, if "and" had not received the effect there given to it, the title might have gone out of the family of Home altogether by the death of the first heir-male of the patentee, leaving daughters only; but there it was held that the heirs-male as a class must first be exhausted before females could come in under the destination to "the heirs of the *said* "heirs."

Here, after the destination to the heirs-male of successive marriages, the destination is carried on to the heirs-female of the existing marriage, that is, just to heirs-at-law, or heirs whatsoever, according to the construction ordinarily put upon such a destination, *Ersk.* III. 8. 48. The intention of the entailer was evidently to preserve the estate in his family; but if the construction given by the Court is sustained, the estate might pass in the third generation out of the entailer's family to that of the husband of one of his grand-daughters.

[*Lord Brougham.* — You would thus bring in the females in two characters, for they are heirs whomsoever, and also heirs-female.

Lord Chancellor (*Cottenham.*) — Suppose the appellant should succeed, and die without issue, who, do you say, would take.]

We are not prepared to say; that would depend on the construction put upon heirs whomsoever. There is an inconsistency in the use of the term heirs-female; for if it should apply to daughters, and there should be more than one, which is to take?

[*Lord Chancellor.* — If daughters can come in as heirs of the marriage, then they cut off the effect of heirs-female.]

Mr Attorney General (*Campbell*) *and Mr Pemberton, for the respondents.*—The respondents are the heirs-portioners and heirs-at-law of Sir Charles, the last heir in possession, and the entail under which they claim was made in implement of a contract of marriage recited in, and thereby imported into, the entail; unless, therefore, there be a clear disposition of the estate otherwise, they must be preferred, *in dubio pro hærede presumendum*, Craigie *v.* Stewart, 11th July, 1738, *Elchies.*

Under a destination to heirs-male of the body, the whole do not take together, but they each take successively; but here the right of each heir taking is enlarged to let in the heirs whatsomever of his body. On the same principle that each heir-male takes successively, so must the heirs whatsomever of his body. The entail itself shews the meaning which is to be put upon the word "and;" it is only used where there is an intention to qualify a right already granted; if a new substitution is to be created, "and" is not used, but "whom failing." The use of the limitation to "heirs-female" was evidently to let in the daughters of the marriage of Elizabeth Macdonald with Sir Charles Lockhart, because they could not have come in, as the respondents do, as "heirs whatsomever" of the body of the heirs-male.

[*Lord Chancellor.* — Heirs-female, you say, are daughters of Elizabeth Macdonald?]

Yes.

[*Lord Brougham.* — That is not the meaning of "heir-"female."]

In this case we think it is, or rather, that it means daughters, and the descendants of daughters. The intention of the entailer was to adopt the legal order of succession, so far as regarded the immediate descendants or sons of himself and his daughter, Mrs Lockhart, but not to preserve the legal course in the collateral succession among these descendants themselves, so that a full sister by a first marriage might not exclude a half brother by a second marriage; reverting, however, to the legal course of succession among the heirs of the descendants, by bringing in the heirs whatsomever of the body of each descendant before the next immediate descendant is entitled.

LORD COTTENHAM. — When this case came first before this House, it appeared to me to be one of novelty and difficulty, and finding very little information as to the grounds upon which the decision of the Court below had been founded, I thought it expedient that this House should have the assistance of all the Judges of the Court of Session before it came to a decision upon it, a course not unusual, and most important in cases which, like the present, involve questions of purely Scotch law, and of very general application, and as to which the decisions most nearly in point appeared to be at variance. When such cases occur with respect to questions of English law, this House never fails to call for the personal attendance of the English Judges. It has not the means of obtaining in that way the assistance of the Judges of Scotland: It therefore endeavours to secure to the suitor the same advantage, as nearly as possible, by a remit to all the Judges. The result of the remit in the present case has been to prove beyond all doubt the great difficulty and novelty of the question; and although a large majority of the Judges have expressed opinions in favour of the former judgment, to which

this House is disposed to pay the utmost attention, yet it is the duty of this House to exercise its own judgment as to the propriety, under all the circumstances, of adopting the opinions so expressed.

To many of the learned Judges of the Court of Session your Lordships are indebted, for the great care and labour with which they have investigated and discussed this case, and for the learning and talent they have brought to bear upon it. The difficulty may not be palpable to a superficial observation, but to those who have bestowed the most attention to the law, and to the authorities which have been referred to, it has become most apparent.

The principle upon which the law of England and of Scotland, upon questions of limitation, is founded, are so different, that the decisions of the former can have no analogy to the present question.

By the English law, terms of inheritance, such as "heirs," or "heirs of the body," in general are descriptive of the estate which the ancestor takes; but by the law of Scotland they are generally descriptive of the class of persons who are to be called to the enjoyment of the estate upon some particular event happening; and when different classes are to be so called in succession, that event is generally the failure of the class immediately preceding, and is most aptly described by the words "whom failing." When these words are used, no difficulty can arise, but here the words are, "to Elizabeth Macdonald, and the "heirs-male of her body, and the heirs whatsomever of the "bodies of the said heirs-male; whom failing, to her heirs-female "of the body;" and the question is, whether the daughters of a senior heir-male of the body take before a junior heir-male of the body; the daughters claiming as heirs whatsomever of the body of the heir-male of the body who first took, and the heir-male insisting that all heirs-male of the body must be exhausted

before any heirs whatsomever, or heirs-general of the body, can take; and for this purpose contending, that the word "and" is to have the same meaning attached to it as the words "whom "failing;" not that it is necessary to import the words "whom "failing" into the sentence, in substitution for the word "and," for any other expression, shewing that all heirs-male must be exhausted before any heirs-general of the body were called to the succession, would equally exclude the claims of the daughters; so that if the words had been the "heirs-male of her body," and "*then* the heirs whatsomever of the bodies of the said heirs-"male," the intention of postponing the succession of females until all the heirs-male of the body had been exhausted, would have been sufficiently apparent, and the question is, whether the words used do or do not sufficiently express such an intention.

It is impossible to read the very learned and able judgment of Lord Meadowbank without being struck with the reasons he suggests for adopting his construction of the words used. If the settler had intended that in the event of there being an eldest son who should have daughters, the younger sons should be for ever excluded, he would not have described such eldest son by the words "heir-male of the body;" and it cannot be supposed that he intended that the daughters of Elizabeth Macdonald should be preferred to her younger son, in the event of her eldest son leaving only daughters, and those afterwards dying without issue.

If, therefore, it could be established that the consequence of holding that the eldest son took, with remainders upon his death to his daughters, if he had no son, would be, that upon the failure of the line of such daughters, the estate would never return to the younger sons, or their issue, as Lord Meadowbank thinks would be the case, I should feel the greatest difficulty in adopting a construction which would lead to such a result; but I have come to the conclusion that such would not be the consequence of the construction adopted by the majority of the Judges.

When any description of heirs are called, the term "heirs," though used in the plural, is construed to mean individuals who, from time to time, and in succession, may answer the description; the argument against the construction in favour of the daughters assumes that this would be so; but if the gift to heirs may be so divided as to give the estate to every individual heir in succession, why may not the next gift to heirs whatsomever of the body be also construed distributively, so as to apply to the heirs-general of the body of each successive heir-male who might be added to the succession?

The Roxburgh case, though not a direct authority for the present, shews how freely the expressions used in a settlement may be dealt with, for the purpose of giving effect to the apparent intention of the author of it. When, indeed, it was held that the limitation to the eldest daughter, with the other expressions used, amounted to a limitation to the four daughters in succession, and it became necessary to decide upon the effect of the next limitation, "and their heirs-male," a case very similar to the present was presented, for if "and" was to be construed "whom failing," there would be a gift to a class, "whom "failing," to another. If, therefore, in that case the heirs-male of each daughter took immediately after such daughter, why should not the limitation in this case "to the heirs whatsomever "of the body of the heirs-male of the bodies," operate so as to give the estate to the "heirs whatsomever" of each heir-male who should come into possession?

It is not disputed that in general the word "and" means the same as "whom failing." I cannot, however, but think that this case would have been very different if "whom failing" had stood in the place of the word "and." It would have marked a precision with respect to the event upon which this gift to the "heirs whatsomever" was to take place, which it would have been very difficult to get over; whereas the word "and," whilst

it shewed that the "heirs whatsomever of the heirs-male" were to take, left the sentence so imperfect as to the mode in which that was to take place, as to give greater latitude to the adoption of any construction which seemed best calculated to effect the object of the settler.

If the noble and learned Lord's observations upon the Polwarth case are to be understood as having laid it down that the word "and" must in all cases have the same effect as the words "whom failing," I should feel the greatest difficulty in reconciling the decision in this case with such opinions, but I do not so understand the expressions attributed to them. I think, therefore, that in this, as in the Roxburgh case, we are at liberty to construe and expand the condensed expressions of the settlements, so as to introduce a limitation to the heirs-general of the body of each heir-male of the body immediately after the estate of such heir-male, if such shall appear upon the face of the deed to have been the intention of the settler; and of this I think there is sufficient proof from the circumstances commented upon by the several learned Judges of the Court of Session, and which it is therefore unnecessary to discuss in detail; but of those, what has operated most upon my mind is, the consideration that this construction provides for all the events which could have happened, whereas, if the heirs-general of the bodies of the heirs-male are not to take until all the heirs-male are exhausted, there would be an absolute failure in the deeds as to any provision regulating in what manner such heirs-general of the bodies were to take, whether all together, or whether the heirs of the first heir-male, or of the last.

I cannot, also, but think that the form of the expression used leads to the same conclusion, for although the gift to the "heirs-male of the body" may include many in succession, the probability was, that it would never operate in favour of the eldest, and with this view the limitation is to such eldest heir-male of

the body, and the heirs whatsomever of the body of such heir-male. The same principle which divides the gift to the heir-male of the body so as to include several in succession, must operate to divide the gift to the heirs whatsomever of such heirs-male, so as to give it in succession to the heirs whatsomever of each heir-male.

Nothing can be more distressing than to have to dispose in this House of a decision upon a question of pure Scotch law, when it is found not to be possible to concur in the reasons upon which it is rested by a great majority of the Scotch Judges. I am happy to say that such is not the case in this instance. The assistance now afforded by the learning and observations of many of the learned Judges has enabled me to come to a conclusion satisfactory to my own mind, that the interlocutor appealed from ought to be affirmed.

I regret the expense which the remit must have occasioned to the parties. The circumstances under which the case in the first instance came before us, and the apparent inconsistency in such authorities as were submitted to our consideration, and the general importance of the question, to which this House is bound to look, as well as to the interests of the parties litigant, rendered this indispensable.

I move your Lordships, that the interlocutor appealed from be affirmed, but without costs.

Lord Brougham. — My Lords, I entirely agree with my noble and learned friend, after much consideration of the question, and after feeling the difficulties that were thrown in our way by the very able and learned arguments of one of the learned Judges below, as well as by other considerations which arose in the course of the discussion which this matter underwent at your Lordships' bar, I nevertheless with him have come to the conclusion that this judgment ought to be affirmed.

My Lords, with respect to the Polwarth-case, reference has

been made to what passed in this House upon that case, and to some observations supposed to have been made by a noble and learned friend of mine, not now present, the Lord Chancellor, and myself. I have only to state, that my noble and learned friend is perfectly right in what he has stated, that considerable misapprehension has prevailed, both in the Court below, and also in the course of the argument at your Lordships' bar, as to the meaning and import of the words "whom failing;" what we there said has not been accurately represented, but even if it had been accurately represented, those remarks made by my noble and learned friend and myself in the Polwarth case, were extra-judicial in regard to the matter decided in that case, and consequently, if no mistake had arisen with respect to the tenor of those remarks, if they had been accurately represented both below and here, the present judgment of the Court below, which I hope your Lordships are about now to affirm, would not have been at variance with any thing that was decided in the Polwarth case. I perfectly agree with my noble and learned friend, that if, instead of the word "and," the words "whom failing" had been used here, it would have made a very great difference, and the question could hardly in fact have arisen.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed.

ALEXANDER DOBIE—SPOTTISWOODE and ROBERTSON, Agents.

[21st March, 1842.]

WILLIAM BAIRD and Co. of Gartsherry Iron Works, *Appellants.*

JAMES B. NEILSON, and Others, *Respondents.*

Construction — In an agreement for compromising a question, as to whether a patent had been violated, whereby the party agreed to pay the patentee so much per ton on goods manufactured "in "any of the modes heretofore practised by him, or in any other "mode falling under the description" in the patent, held, "that "the modes heretofore practised" were embraced, whether falling within the patent or not.

Suspension. — A party raising by suspension a question, confined to his *liability* under an agreement, cannot, in the same process, be relieved in regard to the *manner* in which the liability is attempted to be enforced.

Diligence. — Horning, upon an agreement to render an account, exhibit books in support of it, and pay according to the account, is competent.

IN the month of November, 1833, the appellants and respondents entered into an agreement, the respondents being parties thereto of the first part, and the appellants of the second part, which was in these terms, — "Whereas the said "James Beaumont Neilson obtained Letters-Patent, bearing "date the first day of October, eighteen hundred and twenty-"eight, for the sole and exclusive use and privilege in that part "of the United Kingdom called Scotland, of an invention for "the improved application of air to produce heat in fires, forges, "and furnaces, where bellows or other blowing apparatus is "required, for the term of fourteen years from the date of the

" said letters-patent; and whereas the said James Beaumont " Neilson, together with the said Charles Macintosh, Colin " Dunlop, and John Wilson, are now jointly interested in the " said patent, and in the benefits resulting therefrom; and " whereas, by contract and agreement entered into between " the said parties, dated the twenty-eighth of March, and seven- " teenth and eighteenth of April, eighteen hundred and thirty- " two, and recorded in the books of Council and Session the " sixth day of August thereafter, the said first parties did, in " pursuance of the said agreement therein recited, and in con- " sideration of the reservation and covenants therein contained, " give and grant unto the said second parties, full and free " license and permission to use and exercise the said invention " mentioned in the said letters-patent and specification thereof, " as far as the same related to the use thereof in blowing the " smelting or blast-furnaces situated at Gartsherry, but not else- " where, upon the terms and conditions therein mentioned, for " all the remainder then to come of the term of fourteen years " granted by the said letters-patent; and whereas the said first " parties did, in virtue of letters of horning raised at their " instance against the said second parties, dated and signeted the " fifth day of August, eighteen hundred and thirty-two, charge " the said second parties to implement and perform the obliga- " tions and stipulations undertaken by them in the said contract " and agreement; and whereas the said second parties brought a " suspension of the charge, upon the ground, *inter alia*, that the " said letters-patent were void and ineffectual, and that the " apparatus by which they, the said second parties, had applied, " and were applying heated air in blowing the smelting or blast- " furnaces at Gartsherry, did not fall under that invention, the " exclusive use of which was granted by the said letters-patent; " and whereas the said bill of suspension was reported to the " Lords of the First Division of the Court of Session, and was

" by them passed upon caution, and the expede letters of suspen-
" sion are now in dependence before Lord Corehouse, Ordinary;
" and whereas the said first parties, in consequence of the con-
" tinued refusal of the said second parties to implement and
" perform the obligations and stipulations incumbent on them by
" the foresaid contract and agreement, and in virtue of the
" powers which, by the said contract and agreement, were
" reserved to them, did, by the deed of revocation, dated the
" twenty-seventh, and registered in the books of Council and
" Session the twenty-eighth day of February, eighteen hundred
" and thirty-three, but under the reservations therein expressed,
" revoke and annul the license and permission granted to the
" said second parties, by the contract of license before recited,
" to use and exercise the said invention mentioned in the letters-
" patent before recited, and in the specification thereof before
" referred to: And whereas the said first parties did thereafter
" institute an action of declarator against the said second parties,
" for having it found and declared, that the foresaid contract and
" agreement was, under the reservations contained in the said
" deed of revocation, void and null: And whereas the said first
" party did also, upon the fifteenth day of March last, present a
" bill of suspension and interdict to the Lords of Council and
" Session against the said second parties, praying that their
" Lordships might interdict and prohibit the said second parties
" from applying, by means of the apparatus then used by them,
" heated air for the purpose of smelting iron from the ore at
" their said works at Gartsherry aforesaid, or elsewhere: And
" whereas, while the interdict prayed for by the said bill of sus-
" pension was refused, the said bill of suspension itself was passed
" for the purpose of trying the merits of the question which was
" thereby raised: And whereas, all the said processes of suspen-
" sion and declarator between the said parties, are now in depen-
" dence before the Lord Corehouse, Ordinary: And whereas it

" has been agreed between the said parties, — First, That the " said William Baird, Alexander Baird, James Baird, Douglas " Baird, and George Baird, as copartners foresaid, should dis- " charge the process of suspension first before recited, brought " by them as aforesaid, in which they not only disputed the " validity of the said patent, but denied that the mode pursued " by them in the application of heated air to the smelting of iron " from the ore at their works at Gartsherry aforesaid, fell under " the invention, the exclusive use of which was granted by the " foresaid letters-patent. Secondly, That the said James Beau- " mont Neilson, Charles Macintosh, Colin Dunlop, and John " Wilson, should, in consideration of the present payment by " the said second parties of four hundred pounds, to be accepted " by the said first parties in full of one shilling per ton upon the " whole iron smelted by the said William Baird, Alexander " Baird, James Baird, Douglas Baird, and George Baird, as " copartners foresaid, at their said works at Gartsherry, by " means of heated air, in whatever way applied, from the time " of the erection of their said works, until the eleventh day of " November current, in like manner discharge and pass from the " letters of horning raised by them against the said second parties, " the charge given to the said second parties under the said " letters of horning, and the foresaid process of suspension " brought by them, the said first parties, for having the said " William Baird, Alexander Baird, James Baird, Douglas Baird, " and George Baird, as copartners foresaid, prohibited and dis- " charged from applying heated air by means of the apparatus " then used by them in the smelting of iron from the ore, at " their said works at Gartsherry. And thirdly, That the said " James Beaumont Neilson, Charles Macintosh, Colin Dunlop, " and John Wilson, should, in consideration of the payment at " the terms and in the manner after-mentioned, of one shilling " per ton upon the whole iron which has been or shall be smelted

"by the said William Baird, Alexander Baird, James Baird, "Douglas Baird, and George Baird, as copartners foresaid, from "the said eleventh day of November current, till the expiry of "the term granted by the foresaid letters-patent, by the use of "heated air in any of the modes heretofore applied, or in any "other mode falling under the said patent, to be hereafter "applied by the said William Baird, Alexander Baird, James "Baird, Douglas Baird, and George Baird, as copartners fore- "said, or their said successors, should grant to them, the said "William Baird, Alexander Baird, James Baird, Douglas "Baird, and George Baird, as copartners foresaid, upon the "terms and conditions, and subject to the conditions hereinafter- "mentioned, a license to use and exercise the invention described "in the said letters-patent and specification thereof, at the iron "works situated at Gartsherry aforesaid, or that may be erected "by them on the estate of Woodhall, in the parish of Bothwell, "and county of Lanark, in so far, but in so far only, as the said "invention is applicable to the smelting of iron from the ore in "blast furnaces: And seeing that, in pursuance of the said "agreement, the said William Baird, Alexander Baird, James "Baird, Douglas Baird, and George Baird, as copartners fore- "said, have, upon the one part, now paid down to the said "James Beaumont Neilson, Charles Macintosh, Colin Dunlop, "and John Wilson, the said sum of four hundred pounds ster- "ling, in full of the said stipulated payment, in full of the rate "of one shilling per ton on the iron smelted from the ore in the "furnaces of the said second parties at Gartsherry aforesaid, "previous to the said eleventh day of November current, by the "use of heated air, in whatever way applied, at their said works, "the receipt of which sum is hereby acknowledged, and all "exceptions to the contrary for ever renounced; and have also "discharged and passed from, as they do hereby discharge and "pass from, the process of suspension first before recited pur-

" sued by them the said second parties against the first parties, " on the grounds that the said patent was void and ineffectual, " and that the means used by them, the said second parties, for " applying heated air in the smelting of iron at their said works, " did not fall within the invention, the exclusive use of which was " granted by the said patent: Therefore, and in implement of " the obligations incumbent on them by the said agreement, the " said James Beaumont Neilson, Charles Macintosh, Colin Dun- " lop, and John Wilson, have discharged and passed from, as " they do hereby discharge and pass from, the letters of horning " raised by them, as before mentioned, against the said William " Baird, Alexander Baird, James Baird, Douglas Baird, and " George Baird, as copartners foresaid, the charge given to them, " the said second parties under the said letters of horning, and " the foresaid process of suspension now depending in Court at " the instance of the said first parties against the said second " parties, together also with all claims and demands of every " description competent to them, the said first parties, against " the said second parties, by reason of the infringement or inva- " sion of the said patent right by the said second parties: And " farther, the said James Beaumont Neilson, Charles Macintosh, " Colin Dunlop, and John Wilson, in consideration of the reser- " vation and covenants herein before written, and in farther pur- " suance of the said agreement, have given and granted, as they " do hereby give and grant, unto the said William Baird, " Alexander Baird, James Baird, Douglas Baird, and George " Baird, as copartners carrying on business as aforesaid under " the firm of William Baird and Company, and to their succes- " sors in their said works at Gartsherry, full and free license and " permission to use and exercise the said invention mentioned " in the said letters-patent, and in the specification thereof, in so " far, but in so far only, as the said invention may be used in " blowing the smelting or blast furnaces erected or to be erected

"by the said second parties at their said works at Gartsherry "aforesaid, or at any works which they may erect upon the estate "of Woodhall aforesaid, for all the remainder now to come of the "period of fourteen years granted by the said letters-patent, "yielding and paying therefor unto the said James Beaumont "Neilson, Charles Macintosh, Colin Dunlop, and John Wilson, "and to the survivors or survivor of them, and to the executors "of the survivor, for behoof of themselves, and the heirs of the "deceaser, and to the assignees of the survivors or survivor of "them, or of the executors of such survivor, the sum of one "shilling for every ton of iron which has been smelted, or may "be smelted at their said works between the said eleventh day "of November current, and the expiry of the time granted by "the said letters-patent, by the application or use of heated air "in any of the modes heretofore practised by the said second "parties at their said works, or in any other mode falling under "the description in the said patent or in the specification there-"of, — such payment, except the last payment, to be made half-"yearly at the terms of Candlemas and Lammas in each year, "beginning as at the term of Candlemas, eighteen hundred and "thirty-four, for the term preceding; and the last payment to "be made on the day of the expiration of the said term, with a "fifth part farther of each term's payment of liquidate penalty "in case of failure in the punctual payment thereof, besides the "lawful interest of each term's payment from the time when it "becomes due till payment. For which causes, and on the other "part, the said William Baird, Alexander Baird, James Baird, "Douglas Baird, and George Baird, bind and oblige themselves "and their respective heirs, executors, and successors whomso-"ever, conjunctly and severally, and the said Company of "William Baird and Company, from time to time to content and "pay or cause to be paid, to the said James Beaumont Neilson, "Charles Macintosh, Colin Dunlop, and John Wilson, and

" theirs aforesaid, the sum aforesaid of one shilling for every ton " of iron smelted, or to be smelted, as aforesaid, on the days " before specified, whereupon the same shall be payable, with " penalty and interest aforesaid in case of failure; and the said " William Baird, Alexander Baird, James Baird, Douglas Baird, " and George Baird, farther bind and oblige the said William " Baird and Company, and themselves as individuals, and theirs " aforesaid, during the continuance of this license, to render to " the said Charles Macintosh, Colin Dunlop, James Beaumont " Neilson, and John Wilson, and theirs aforesaid, a just and " true account or particular in writing to be verified by affidavit " if required, such affidavit to be sworn before a Magistrate, of " the number of tons of iron smelted in manner foresaid, in each " and every week up to the period in which the sums payable in " virtue of these presents shall become payable, and also, if re- " quired, to produce all books, accounts, and writings, relating " to the quantity of iron smelted, as aforesaid, kept at the said " works, by means of a reference to which the amount of iron so " smelted may be ascertained. Providing always, as it is hereby " expressly provided and declared, that it shall not be lawful to, " nor in the power of the said William Baird and Company, or " of the said William Baird, Alexander Baird, James Baird, " Douglas Baird, and George Baird, or theirs aforesaid, during " the subsistence of this license, directly or indirectly to chal- " lenge the validity or effect of the foresaid patent, or to suspend " any charge that may be given them or theirs aforesaid for pay- " ment of the sums to become due from them or theirs aforesaid, " under these presents, or for implement of the obligations here- " by incumbent on them, on any ground or pretext whatever, so " long as the said letters-patent are not declared void and null, " as is hereinafter provided for. And the said William Baird, " Alexander Baird, James Baird, Douglas Baird, and George " Baird, farther undertake and bind and oblige the said William

" Baird and Company, and themselves as individuals, and theirs " aforesaid, not to make use of the said invention under or by " virtue of the license hereby granted, for any other purpose " than for smelting of ironstone or iron-ore, and that nowhere " than at their works situated at Gartsherry, or at Woodhall " aforesaid, according to the meaning of these presents: Pro- " vided also, that nothing herein contained shall extend to " abridge or prejudice the right or power of the said Charles " Macintosh, Colin Dunlop, James Beaumont Neilson, and John " Wilson, or theirs aforesaid, to use, and exercise, and vend the " said invention, and grant a license or licenses in that behalf to " any person or persons within the terms of the said letters-patent; " but that they, the said Charles Macintosh, Colin Dunlop, " James Beaumont Neilson, and John Wilson, and theirs afore- " said, and their future assignees or grantees respectively, shall, " or may use, exercise, and vend the said invention in such and " the same manner as if these presents had not been made; it " being always understood, that from and after the date of these " presents, the said patentees shall not be at liberty to grant " licenses unto any other party in the same trade with the said " second party at a lower rate than that herein stipulated, without " communicating the same reduction per ton to the said second " party, without prejudice to the said first parties granting " licenses for the full period to run of the said patent at such a " slump price as they may consider to be fair and reasonable: " And provided also, that if, during the remainder of the term " of the said patent, any action, suit, or other proceeding, shall " be brought or instituted, under or in consequence of which, or " by any other means or proceedings, the said letters-patent shall " become void, all sums of money whatsoever which previously, " and up to the day on which the said letters-patent shall have " become void, shall have been paid or become payable to the " said Charles Macintosh, Colin Dunlop, James Beaumont

" Neilson, and John Wilson, and theirs aforesaid, under the pro-
" visions herein contained, shall, notwithstanding any such action
" suit, or other proceeding, and notwithstanding the event there
" of, be retained by the said Charles Macintosh, Colin Dunlop
" James Beaumont Neilson, and John Wilson, and theirs afore
" said, and be recoverable by them from, and be paid to them
" and theirs aforesaid, by the said William Baird and Company
" and the said William Baird, Alexander Baird, James Baird
" Douglas Baird, and George Baird, as individuals, and their
" aforesaid, in the same way, in every respect, as if no such actio
" or other proceeding had taken place; but the subsequent o
" suspended payments shall not be payable. And the sai
" Charles Macintosh, Colin Dunlop, James Beaumont Neilson
" and John Wilson, for themselves and theirs aforesaid, jointl
" and separately, do hereby covenant, promise, and agree, fro
" time to time, at their own expense, to prosecute, without an
" unreasonable delay, all parties infringing the said patent, in s
" far as the same is applicable to the smelting of iron from iron
" stone or ore, but not farther; or to adopt such other proceed
" ings as shall restrain the parties so infringing the same, from th
" illegal use of the invention thereby protected, upon notic
" thereof in writing being given to them by the said Willia
" Baird, Alexander Baird, James Baird, Douglas Baird, an
" George Baird, and theirs aforesaid. But if, from any cau
" whatever, the said Charles Macintosh, Colin Dunlop, Jame
" Beaumont Neilson, and John Wilson, and theirs aforesaid, sha
" not take any proceedings in law or in equity against the sai
" parties so infringing the said patent, then the said Williar
" Baird, Alexander Baird, James Baird, Douglas Baird, an
" George Baird, and theirs aforesaid, shall be at liberty to us
" and exercise the said invention, without making any paymer
" for the same, so long as the said Charles Macintosh, Coli
" Dunlop, James Beaumont Neilson, and John Wilson, and thei

" aforesaid, shall abstain from taking any such proceedings as " aforesaid; and that in case the said Charles Macintosh, Colin " Dunlop, James Beaumont Neilson, and John Wilson, shall " finally determine not to take any such proceedings against any " party or parties infringing the said patent, then that these pre- " sents, and the covenants and agreements herein contained, " shall be void and of no effect: Provided always, and it is hereby " declared, that in case any of the payments hereinbefore re- " served, shall be in arrear for the space of forty days, the same " having been lawfully demanded ten days previously to the expira- " tion of the said forty days; or if the said William Baird and " Company, William Baird, Alexander Baird, James Baird, " Douglas Baird, and George Baird, and theirs aforesaid, shall " use the said invention, except for the purpose of smelting iron " as aforesaid, or elsewhere than in their blast-furnaces situated " at Gartsherry, or at Woodhall aforesaid, or shall do or " execute any act, deed, matter, or thing whatsoever, by reason " whereof the said letters-patent may become void or voidable, " — then, and in any such cases, it shall be lawful for the said " Charles Macintosh, Colin Dunlop, James Beaumont Neilson, " and John Wilson, and theirs aforesaid, by any deed to revoke " and annul these presents, and the same shall thereupon be " void; but subject, and without prejudice, to any of the provi- " sions and obligations herein contained, previously exigible " from, or prestable by, the said second party; which provisions " and obligations shall continue in full force; and both parties " oblige themselves, and theirs aforesaid, to implement and fulfil " their respective parts of the premises to each other, under the " penalty of five hundred pounds sterling, to be paid by the " party failing to the party performing, besides performance. " Consenting to the registration hereof in the books of Council " and Session, or others competent, therein to remain for pre- " servation, and that letters of horning, on six days' charge, and

" all other necessary execution, may pass upon a decree to be " interponed hereto in common form; and for that purpose, the " parties hereto constitute John Hope and James Miller, junior, " Esquires, advocates, their prors. &c. In witness whereof," &c.

In the year 1840, the appellants recorded this agreement, and took out an extract with the following decree interponed in terms of the clause of registration: —

" And the said Lords grant warrant to messengers at arms, " in her Majesty's name and authority, to charge the party or " parties, defender or defenders aforesaid, personally, or at his, " her, or their respective dwelling-place or places, if within Scot- " land, and if furth thereof, by delivering a copy or copies of " charge at the office of the keeper of the record of edictal cita- " tions at Edinburgh, to pay, implement, and perform the hail " foresaid sum or sums, or obligations, or any of them, all in " terms, and to the effect contained in the decree and extract " above written, and here referred to and held as repeated " *brevitatis causa*; and that to the said party or parties, pursuer " or pursuers aforesaid, within six days if within Scotland, and if " furth thereof, within sixty days next after he, she, or they, are " respectively charged to that effect, under the pain of poinding " and imprisonment, the term or terms of payment being always " first come and bygone, and also under deduction of any sum " or sums paid to account (if any): And also grant warrant to " arrest the said party or parties', defender or defenders' readiest " goods, gear, debts and sums of money, in payment and satis- " faction of the said obligations or any of them; and if the said " party or parties, defender or defenders, fail to obey the said " charge, then to poind the said party or parties' readiest goods, " gear, and other effects, and if needful for effecting the said " poinding, grant warrant to open all shut and lockfast places, " in form as effeirs."

The respondents gave the appellants a charge of horning upon

this extract. The appellants thereupon presented a note of suspension of the charge, with an offer "to find caution in common "form."

The first ten articles of the Statement of Facts lodged by the appellants in support of their note of suspension, set out the proceedings detailed in the agreement, forming the ground of charge, and the making of that agreement. The 11th and 12th articles were in these terms: —

"11. The chargers have now recorded the aforesaid agree- "ment or license, and raised thereon letters of horning, in virtue "of which, the complainers have been charged to render an "account, verified by affidavit sworn before a magistrate, of the "iron smelted by them at their works, by means of Mr Neilson's "patent, or by any mode falling under the description in the "said patent, or in the specification thereof; and to produce all "books, accounts, and writings relating to the quantity of iron "smelted by them as aforesaid, from the 1st of August, 1839 to "the 2d of February, 1840. But the complainers aver and offer "to prove, that they have not, during the aforesaid period, at "their works at Gartsherry, or elsewhere, used the patent pro- "cess in the smelting of iron, or any mode or process of smelting "falling under the description in the patent, or in the specifica- "tion thereof; — on the contrary, they have used, and continue "to use, in the smelting of iron, a process which is altogether "different in principle, and in the mode or use, from the alleged "patent or invention, and which consequently does not fall under "the patent or description given in the relative specification of "the alleged invention of Mr Neilson."

"12. By the agreement of 1833, the complainers obtained the "chargers' license or permission to use Mr Neilson's invention, "if they thought proper to do so, and if they availed themselves "of the permission, they engaged to pay the stipulated license "duty or consideration. But it was not obligatory on them to

" use the invention, or to pay the stipulated duty whether they
" used it or not; or if they did not use the invention, they could
" not be required to render any account of their operations, or
" produce their books and accounts of different operations alto-
" gether, so as to disclose their transactions to the chargers; —
" yet that seems to be the object of the chargers; for the com-
" plainers informed them, before the agreement was put upon
" record, that they had not used the patent process, or any mode
" of manufacture falling under the description of it since the 1st
" of August, 1839."

The 13th and 14th articles set forth statements to shew, that the patent of the respondents was void, and were followed by this: —

" But it is needless to go into these matters, because the case
" of the complainers simply is, that they could not be compelled
" even in an ordinary action on the contract, and still less by a
" vague charge of this description, to render an account of iron
" smelted *by a process which they aver and offer to instruct that*
" *have not used.*"

The pleas founded upon these statements, were in these terms: —

" I. The charge is inept, in so far as nothing can follow upon
" it, there being no liquid ground of debt; and, in the circum-
" stances, the chargers ought, if they aver that the complainers
" have used the patent process in the smelting of iron at their
" works, from the 1st of August, 1839, to have constituted their
" claim in an ordinary action of debt."

" II. At all events, as the complainers have not used the
" patent process, or any mode falling under the description
" thereof given in the specification, since the 1st of August, 1839,
" they are not liable to render the account, or to exhibit the

"books in terms of the charge which they have received; nor, "as there has been no failure on their part to implement the "agreement or license, are they liable to pay the penalty stipu- "lated in case of such failure."

The answer of the respondents to the articles of the appellants' statement, which have been noticed, was in these terms: —

"XI. Admitted that the license of 1833 has been recorded, "and that the complainers have been charged by virtue of letters "of horning to implement the obligations undertaken by them "in the said agreement, for the period between Lammas, 1839, "and Candlemas, 1840. *Quoad ultra*, denied, under this ex- "planation, that the complainers have admitted, both judicially "and extrajudicially, and more particularly in the narrative o. "the agreement of 1833, which terminated the former litigation, "that they have used the patent process at the Gartsherry Iron "Works, and that they have farther practically admitted the use "of it, by paying to the chargers one shilling per ton upon the "iron smelted at Gartsherry, as the stipulated price of the pri- "vilege of using the patent process. They have not, in the pre- "sent statement of facts, ventured to allege that any change "whatever has been made in the state of their works at Gart- "sherry, or in the mode of smelting iron there, since the time "when they admit that they used the patent process."

"XII. Admitted that the complainers extrajudicially refused "to implement their obligations under the agreement of 1833, "and that this refusal applies to the period subsequent to 1st "August, 1839. *Quoad ultra*, denied, under reference to the "agreement."

The first article in the Statement of facts for the respondents was thus expressed: —

"1. The chargers take leave to refer to the narrative of the "license and deed of agreement of November, 1833, for a correct "history of the legal proceedings formerly depending between

" use the invention, or to pay the stipulated duty whether they " used it or not; or if they did not use the invention, they could " not be required to render any account of their operations, or " produce their books and accounts of different operations alto- " gether, so as to disclose their transactions to the chargers; — " yet that seems to be the object of the chargers; for the com- " plainers informed them, before the agreement was put upon " record, that they had not used the patent process, or any mode " of manufacture falling under the description of it since the 1st " of August, 1839."

The 13th and 14th articles set forth statements to shew, that the patent of the respondents was void, and were followed by this: —

" But it is needless to go into these matters, because the case " of the complainers simply is, that they could not be compelled, " even in an ordinary action on the contract, and still less by a " vague charge of this description, to render an account of iron " smelted *by a process which they aver and offer to instruct they* " *have not used.*"

The pleas founded upon these statements, were in these terms: —

" I. The charge is inept, in so far as nothing can follow upon " it, there being no liquid ground of debt; and, in the circum- " stances, the chargers ought, if they aver that the complainers " have used the patent process in the smelting of iron at their " works, from the 1st of August, 1839, to have constituted their " claim in an ordinary action of debt."

" II. At all events, as the complainers have not used the " patent process, or any mode falling under the description " thereof given in the specification, since the 1st of August, 1839, " they are not liable to render the account, or to exhibit their

" books in terms of the charge which they have received; nor, " as there has been no failure on their part to implement the " agreement or license, are they liable to pay the penalty stipu- " lated in case of such failure."

The answer of the respondents to the articles of the appellants' statement, which have been noticed, was in these terms: —

" XI. Admitted that the license of 1833 has been recorded, " and that the complainers have been charged by virtue of letters " of horning to implement the obligations undertaken by them " in the said agreement, for the period between Lammas, 1839, " and Candlemas, 1840. *Quoad ultra*, denied, under this ex- " planation, that the complainers have admitted, both judicially " and extrajudicially, and more particularly in the narrative o. " the agreement of 1833, which terminated the former litigation, " that they have used the patent process at the Gartsherry Iron " Works, and that they have farther practically admitted the use " of it, by paying to the chargers one shilling per ton upon the " iron smelted at Gartsherry, as the stipulated price of the pri- " vilege of using the patent process. They have not, in the pre- " sent statement of facts, ventured to allege that any change " whatever has been made in the state of their works at Gart- " sherry, or in the mode of smelting iron there, since the time " when they admit that they used the patent process."

" XII. Admitted that the complainers extrajudicially refused " to implement their obligations under the agreement of 1833, " and that this refusal applies to the period subsequent to 1st " August, 1839. *Quoad ultra*, denied, under reference to the " agreement."

The first article in the Statement of facts for the respondents was thus expressed: —

" 1. The chargers take leave to refer to the narrative of the " license and deed of agreement of November, 1833, for a correct " history of the legal proceedings formerly depending between

" ing upon a registered contract of agreement, containing obli-
" gations prestable by the complainers; and the chargers are
" entitled, by means of the said charge, to enforce payment and
" performance in terms of the contract."

" 2. The complainers have set forth no relevant or sufficient
" grounds of suspension, and they are barred by the former legal
" proceedings detailed in the narrative of their license, as well
" as by the terms of that license itself, from maintaining that the
" process of smelting iron used at their works does not fall under
" the patent, especially as they have condescended on no change
" of circumstances since the license was granted and accepted,
" and have not averred or offered to prove in what respects the
" mode of smelting iron now used by them differs from that for-
" merly in use at their works, which admittedly fell under, and
" was protected by the patent."

" 3. No ground of fact or law has been stated by the com-
" plainers sufficient, in the circumstances, to justify the passing
" of their note of suspension."

" 4. In consequence of the failure of the complainers to im-
" plement the obligations incumbent on them under their agree-
" ment with the chargers, the chargers are entitled to revoke the
" license granted by them to the complainers under the said
" agreement, and the same has been validly revoked and recalled
" by them, and is null and void accordingly, in all time
" coming."

On advising the note of suspension and the statements of the parties, the First Division of the Court of Session pronounced the following interlocutor upon the 26th May, 1840: — " The " Lords, upon the report of Lord Gillies, Ordinary, and having " heard counsel for the parties, refuse the note of suspension, " and find the respondents entitled to expenses."

The appeal was taken against this interlocutor.

Mr Attorney-General, Mr Kelly, and Mr Gordon for appellants. — I. The meaning of the agreement was, that the appellants admitted that they had violated the patent, and agreed to pay for any of the modes which they had theretofore used, falling under the patent, or for any other mode which they might use, falling under the patent. If, therefore, the appellants have not been using any mode falling within the patent, there is no payment exigible under the agreement, nor any account of workings to be kept. The agreement was first a compromise as to whether the previous use was within the patent, but did not embrace any other use which might not be within the patent.

[*Lord Cottenham.* — The effect of such a compromise would have been to leave the question open the next day.

Lord Brougham. — You have not averred that you have changed your mode of working.]

The agreement was, that the uses previous to it should be held to be within the patent, and the averment on the record by the appellants was, that they had not used any mode within the patent, that is, coming within the agreement; this is equivalent to an averment that they had changed the mode of working from what it was previous to the agreement..

[*Lord Cottenham.* — The only ground on which you asked the interposition of the Court was, that the mode used was not within the patent; but the agreement precluded your doing so.]

There was nothing, in common sense, why the parties should have agreed to pay, in regard to a mode not within the patent, and it will be difficult to give a meaning to the words, "other "modes," unless they are limited to modes falling within the patent. If so, then "falling under the description" applies to the "modes heretofore practised," as well as to "any other "modes." This, then, leaves it open to the appellants to shew, under the agreement, that the modes "heretofore practised," were not within the patent.

" ing upon a registered contract of agreement, containing obli-
" gations prestable by the complainers; and the chargers are
" entitled, by means of the said charge, to enforce payment and
" performance in terms of the contract."

" 2. The complainers have set forth no relevant or sufficient
" grounds of suspension, and they are barred by the former legal
" proceedings detailed in the narrative of their license, as well
" as by the terms of that license itself, from maintaining that the
" process of smelting iron used at their works does not fall under
" the patent, especially as they have condescended on no change
" of circumstances since the license was granted and accepted,
" and have not averred or offered to prove in what respects the
" mode of smelting iron now used by them differs from that for-
" merly in use at their works, which admittedly fell under, and
" was protected by the patent."

" 3. No ground of fact or law has been stated by the com-
" plainers sufficient, in the circumstances, to justify the passing
" of their note of suspension."

" 4. In consequence of the failure of the complainers to im-
" plement the obligations incumbent on them under their agree-
" ment with the chargers, the chargers are entitled to revoke the
" license granted by them to the complainers under the said
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[*Lord Brougham.* — This use of the word "other," though not quite correct, is common, as, in the Scots statutes "contrary "the laws of God and all other human laws," — not meaning by that, that the laws of God are human, but to embrace all other laws, such laws being human.]

II. But whatever may be the proper construction of the agreement, there must be judicial inquiry as to the rights of the parties under it. The effect of the judgment in the Court below is to prevent any inquiry into the validity of the agreement, or the regularity of the proceedings which have been adopted under it. The decree upon which these proceedings have been taken was one made without any inquiry or discussion whatever, and obtained as of course by the mere registration of the agreement. That decree orders the party to perform all the matters covenanted in the agreement, and the letters of horning are in the same terms. But if the Court will not interfere, as by their judgment they have refused to do, who is to judge whether the matters covenanted have or have not been performed? who is to judge of the correctness of the account kept by the appellants? or of the sufficiency of the affidavit in support of it? or as to the mode of working they have been adopting, whether coming within the agreement or not? It is impossible that the agreement can be enforced without judicial intervention. To deny this would be to give to the parties a right to help themselves at their own hand, and hale each other to prison, to demand the penalty of L.500, as well as the 1s. per ton.

[*Lord Cottenham.* — Is there any allegation on the record that the party is doubly charged for the 1s. per ton and the penalty.]

The first and second pleas substantially raise that question.

[*Lord Cottenham.* — If the Court had held you liable to pay 1s. per ton, could you have taken this proceeding to protect

yourself against the penalty until the amount payable was ascertained?]

Yes.

[*Lord Cottenham.* — Then you must have stated facts to lay ground for the interposition of the Court.]

The penalty was not agreed upon as liquidated damages, and it is therefore subject to an equitable restriction, *Stair*, I. 10. 14. Wright v. Macgregor, 4 *S.* and *D.* 434. In Johnson's Trustees v. Johnson, 19 *F. C.* p. 625, it was held, that the penalty is not the damage ascertained, but the amount within which the damage, when ascertained, is to be limited.

[*Lord Cottenham.* — That question cannot arise here, the only question raised by the suspension is, whether you have infringed the patent; you did not say you had offered to pay the 1s. per ton, and suspension was not asked on the ground of ascertaining what was due under the agreement.

Lord Brougham. — That brings the question entirely to that of violation of the agreement.]

The first plea seems to raise the question as to what was due, and it is impossible to say what the parties are entitled to under the agreement without judicial inquiry. In the proceedings adopted by the respondents, though interdict was refused, yet an account of our workings was ordered to be kept by us; this of itself would be sufficient to warrant the relief we ask.

[*Lord Campbell.* — If you had averred that you were not using the mode used before the agreement, and had changed your works, no doubt the note of suspension would have been passed.]

But there was debateable matter as to the construction of the agreement; it was open to ascertain whether what was being done was a violation of the patent, though it might be a matter of proof against appellants, that what was being done was the same as had been done previous to the agreement.

[*Lord Brougham.* — The Court could have entertained the question of construction in the suspension.]

Lord Campbell. — We are of opinion that the appellants were not entitled to adopt the mode of manufacture used previous to the agreement. We are of opinion that they were concluded as to this by the agreement. The counsel for the respondents need not therefore address themselves to the argument as to the construction of the agreement.

Mr Solicitor-General and Mr Andersen for the respondents. — We apprehend that disposes of the case.

[*Lord Brougham.* — Advert to the issue between the parties. You have not said that they have changed their works.]

The eleventh article of our answer and our second plea substantially do raise that question.

[*Lord Brougham.* — That is all as to use being within the patent.]

The appellants say we have not smelted within the patent. We answer, you have smelted as you did prior to the agreement, and by it you are concluded as to whether that is within the patent or not; and we say the suspension is not relevant, because they have not averred any change in their works. If they are entitled to say that the mode used before the agreement was not within the patent, then the appellants may be entitled to suspension; but if they are not entitled to say so, as the House seems to hold, then they cannot be entitled to suspension. The case, as it now stands, is, whether the party, alleging that he was working exactly as he had done before the agreement, is entitled to this suspension.

[*Lord Brougham.* — Don't you put it on the record as whether the working was within the patent? and does not that bring it within the power of the Court to say whether it was or not?]

The pleading may be formally wrong, but substantially the question raised is, that the mode used before and after the agreement is the same.

[*Lord Campbell.* — According to our construction of the

agreement, the statement that the use before it was not within the patent, is wholly immaterial.]

Exactly; and moreover, the respondents were not bound to raise the issue in one form or another. They had their agreement, and they asked enforcement of it. It was for the appellants to raise the question in such form as might displace the respondents' right. But our third plea was broad enough to raise the issue in either form.

[*Lord Campbell.* — We should like to hear you as to how the sum payable was to be ascertained in this mode of proceeding, and as to proceeding for the penalty as well.]

The decree upon the registration did not merely order the party to pay 1s. per ton, leaving the amount to be ascertained in any way; the mode of accounting was ascertained. The effect of the decree, therefore, was the same as of a decree formally pronounced by the Court ordering a party to account, and the competency of this mode of proceeding was determined in Fisher *v.* Syme, 7 *S.* 97. There diligence was sustained for a debt not otherwise liquidated than by an account certified by the officer of the party using the diligence. The decree here orders the party to give an account; if we attempt to levy a larger sum than appears to be due upon the account, his remedy will then be open by suspension.

With regard to the penalty, no question was raised as to this in the Court below; it was not made any substantive ground for suspension, it is not so put forward in the cases to this House, and has been raised for the first time at the bar. The second plea of the appellants merely raises a question as to their liability to pay the penalty, as not having failed to implement the agreement; no where do they complain of being doubly charged. If the L.500 is not liquidated damages, but a penalty, they may present a suspension to-morrow.

[*Lord Campbell.* — You say the judgment here only repels these reasons of suspension.]

Exactly. But Wright *v.* M'Gregor shews ——

[*Lord Campbell.* — It is better for you to rest satisfied that the question does not arise on the record, than to deal with it as if raised.]

Certainly, there is nothing to hinder the party to-morrow to bring a new suspension on this ground, but on this record there is no such question raised.

[*Lord Brougham.* — An irrelevant issue was raised as to the construction of the agreement, and was irrelevantly followed by you.]

Mr Attorney in reply. — The diligence was sustained in Fisher *v.* Syme because the sum due had been ascertained in the mode prescribed by the agreement, and so was liquidated. Here the sum due under the stipulation as to 1s. per ton has not in any way been ascertained. Still less has the penalty been modified, as confessedly it must be. The incompetency of the diligence upon the illiquid nature of the debt was distinctly raised by the first plea in law of the appellants, to which no answer was made. What conclusion could have been come to by the mere production of the books? was the party to help himself out of the books? As to the penalty, it was payable on a contingency, and the appellants were not bound to shew that they had not incurred that contingency.

LORD BROUGHAM. — My Lords, I think, in this case, that your Lordships can have no question that the interlocutor of the Court below is well founded, and ought to be affirmed.

The first question raised, is upon the construction of this instrument, and it appears to me, with great submission to your Lordships, that there can be no doubt whatever of the true con-

struction to be put upon the words in the instrument, "the "number of tons of iron smelted in manner aforesaid," which refer, of course, to the previous description given of the mode of smelting used by the present appellants, the suspenders, below, which is described in the following words: "By the application "or use of heated air in any of the modes heretofore practised by "the said parties at their works, or in any other mode falling "under the description in the said patent, or in the specification "thereof." Taking the whole of this instrument together, I think it is perfectly plain what the parties on either side had in view in the agreement. There had been great disputes between them before, turning upon two points, which two points, I am sorry to say, have been raised again, though this agreement was intended to have prevented their again raising them, — one on the validity or invalidity of the patent, and the other whether or not Messrs Baird had, in their works, used the process of the patent. Now, in order to put an end, as it appears to me, for the future, to all such disputes, as well as to ascertain what was to be done with respect to determining the disputes as to the process, they appear to have agreed, that whether the process used by Messrs Baird had fallen within the patent and specification or not, there was equally to be paid the specified sum. The words used are, "The modes heretofore practised by the said "second parties," that is, the Messrs Baird, "at their works, or "in any other mode falling under the description in the said "patent, or in the specification thereof." That is to say, that if the process continued to be used was the same with the process previously used, they were to pay in respect of it, as if it were within the patent; or if, on the other hand, it was a departure from the process which had been previously used, but falling within the patent, that still with respect to that process, they should pay.

Now, I cannot go along with the construction which gives such an effect to the word "or," as to construe this into a distinct

admission of the party, that the previous process was within the patent. I think that it is used in a sense in which it is frequently used, not very accurately certainly. The words are these, "the "modes heretofore practised by the second parties, at their said "works, or any other mode falling under the description in the "said patent, or the specifications thereof," — that is, any other mode, such mode falling within the description of the patent; in other words, provided such other mode be a mode falling within the description of the patent. I apprehend that to be the true meaning, though not certainly a very correct, yet not a very unusual application of the word, "or."

Such being the case, therefore, whether the process used by Messrs Baird fell within the patent, or specification, or not, became immaterial, provided it was a continuation of the process they had theretofore used. When the charge is given upon these proceedings, and the bill of suspension is brought to suspend that charge, the question is, whether or not the case made for the bill of suspension is sufficient to warrant the Court in suspending the charge? Now, what have they pleaded? Their statement and their plea really amount to this, partly that the patent was invalid, and partly that the process used by them was not a process within the patent, which appears to be perfectly immaterial according to the construction which, I humbly think, ought to be put upon the agreement, that whether the process used was within the patent or not, still, if it was a process previously used in those works, it was struck at, and they were bound to pay the one shilling a ton.

It is true, that the respondents did not distinctly meet that statement in the bill of suspension, in a manner the most correct and the most simple in which it might have been met, for it would have been much better if they had said, You have stated an immaterial ground; you have brought forward, on behalf of your bill of suspension, a wholly immaterial and irrelevant plea; for

whether the process used by you fell within the patent and specification or not, is rendered immaterial by the obligations you have incurred by the instrument in question. Instead of that, they rather followed them into that immaterial plea, and negatived it. Instead of saying, it is quite irrelevant, they have said, be it relevant or not, you are wrong; be it immaterial or material, you were precluded from denying that your process is the process of the patent, because you have in that instrument admitted that your process was the process of the patent, and that the case depended upon that. Upon the true construction, as I conceive, of that instrument, that would have been ill founded, for I do not conceive they had so admitted.

But whether the charger is correct or not, they meet his allegation on what is really material. The charger being possessed of that which may be considered a judgment on a registered instrument giving him a right to execution upon that registration, it is for the suspender to displace the diligence, — to shew the Court that the charger has no right to avail himself of that diligence. He has not done that effectually, and consequently, the charger has a right to use his diligence, the suspender having failed in his application to suspend the diligence.

My Lords, I am, upon the whole, of opinion also, that there is no ground for the other argument urged here on the part of the appellant, that the conclusion of the Court below is incompetent. The matter brought before the Court below was the validity of the patent, but still more the conclusion that the process which had been employed was the patent process. The discussion turned much more upon the latter ground. In my humble opinion, the judgment of the Court below, refusing the note of suspension, and sending the case back to the Lord Ordinary to proceed, is well founded, and ought to be affirmed by your Lordships.

Lord Cottenham. — My Lords, I am of the same opinion

with my noble and learned friend. If the question had turned upon the words which are to be found in the license, without any recital, I should have thought that they clearly expressed the intention of the parties, that the shilling a ton was to be paid for all iron made by the process covered by the letters patent, or by any process which had been used by the party before the date of that letter of license. But when the recitals to that instrument are looked to, they seem to me to put the question beyond all doubt. It appears by the recital, that a question had arisen whether the process heretofore used had been or not within the terms of the letters patent, and the agreement is that they shall terminate that contest, by paying one shilling a ton for iron made by means of heated air, in whatever way applied. That expression occurs twice in the recitals: "The use of heated air "in any of the modes heretofore practised by the said parties, at "their said works, or in any other mode falling under the de- "scription in the patent, or in the specification thereof;" and that was absolutely necessary in order to put an end to the contest which had arisen between these parties, which contest was first of all, as to the validity of the patent which was put an end to by this agreement, and secondly, whether or not the process had been a violation of the patent; and for the purpose of putting an end to this part of the contest, they agreed, that this sum should be paid on all iron made by means of heated air, in whatever way applied. It does not actually amount to an admission, that the mode used had been within the terms of the patent, but it amounts to this, that for the purpose of terminating the difference, it shall be deemed as if it had been within the terms of the patent, the one being to pay, and the other to receive, the one shilling a ton. Then, when the parties come to contract for the future, they say, one shilling a ton shall be paid for every ton made by means of the application of heated air "in any of the modes heretofore prac- "tised by the said second parties, at their said works, or in any

"other mode falling under the description in the said patent." These terms are very explicit; they seem to me to leave no doubt of the intention of the parties, who had agreed, as to the time past, to consider that all modes by which iron had been smelted should be subject to the payment of one shilling a ton, and that as to the future, they should pay one shilling a ton for all iron smelted in any manner, according to the terms of the patent, or in any manner heretofore used, which, for the purpose of this contract, should be equally subject to the one shilling a ton, leaving open the question, whether that smelted before the contest of 1833, had been within the terms of the patent or not.

Then when the party finds himself subject to this agreement, he applies to the Court to protect him against what he considers an improper use of the process of the Court; he states the ground on which he makes that application. The grounds are these,—In the 11th article of the statement of facts, they state it in these words, "that the complainers have been charged to render an account, "verified by affidavit, of the iron smelted by them at their works, "by means of Mr Neilson's patent, or by any mode falling under "the description in the said patent, or in the specification thereof," that is, in affirmance of one part of the proposition contained in the contract between the parties by the agreement of 1833, but they leave the other untouched. That may be perfectly true, according to the construction put upon the agreement, and yet they may have used this process before the contract of 1833, but which they now contend, as they did then contend, was not within the terms of the patent; that is not the averment, however, in the case. It is not, therefore, proving the affirmative of that, or assuming to prove the affirmative of that, which shews that they are not liable to the payment of one shilling a ton on all the iron made. That opens the issue again, which both parties intended

should be concluded, that the process used before 1833 was the process which was covered by the patent.

My Lords, what was the real intention of the parties in making this agreement, whether they meant the words to have a meaning different from their obvious meaning, is a question not before us. The question is, whether the appellants have stated a case entitling them to the interposition of the Court; for they must state, and they must make out a case entitling them to interposition. In my opinion, they have not stated a case removing themselves from the payment of the one shilling a ton for the iron so made; and if there had not been a strange misconception of the agreement of the parties, I think there would have been no ground for the argument.

The only difficulty I have had, was in considering whether this process might not be used for the purpose of enabling the Court to adjudicate between the parties, as to what was to be paid, assuming that the iron had been made in the mode subjecting the suspenders to the payment of the one shilling a ton; but when I look to the statement of this case, I do not find any part of it in which they call upon the Court to protect them against the process beyond the amount of the liability which arises from the contract to pay one shilling a ton; they state that they are not liable to pay any thing, because the process they have used is not within the terms of the patent; and in page 4 they put that in the strongest possible light. They say, "It is needless to go into these matters, "because the case of the complainers simply is, that they could "not be compelled even in an ordinary action on the contract, "and still less by a vague charge of this description, to render "an account of iron smelted by a process which they aver and "offer to instruct they have not used." So far, therefore from asking that they may have the assistance of the Court to ascertain whether they are liable to pay the whole, the ground on which

they put their case is, that they have not used any process in respect of which they are liable to pay any thing. That will leave it open to the parties to apply to the Court for an interdict or any other process, as they may be advised. It is sufficient for us at present to say, that on the ground upon which they come here, they have failed in bringing forward any case; and upon a view of the whole case, I think your Lordships are justified in affirming the interlocutor.

Lord Campbell. — My Lords, I entirely agree in the view thus taken by my noble and learned friends who have preceded me. I have very little to add to the observations they have made. The construction of the agreement does not appear to me to admit of any reasonable doubt. There had been a former license granted to Baird and Company, and they had made iron by means of a certain process. A controversy arose whether that mode of making it was an infraction of the patent or not, and whether they were liable to pay the sum they had stipulated to pay, if they availed themselves of the license granted to them. It appears that there were legal proceedings arising out of that. To put an end to these, the parties came to an agreement in 1833; and, according to that agreement, a certain sum of money was to be paid for the iron which had been before made by Messrs Baird and Company according to the process they had adopted; and it was also agreed, that a certain sum of one shilling a ton should be paid thereafter for all iron which was made by them according to the mode they had before adopted, or any other mode which was within the patent. I am clearly of opinion, that this precludes Messrs Baird and Company from contesting that their former process was not within the patent, and that it rendered them liable to pay one shilling a ton for all iron made according to that process, whether within the patent or not. It would be monstrous to say, that Messrs Baird and Company having paid the L.400, if they continued the same process as they

had used before, it would be open to them to contend that it was not within the patent, and that they were no longer liable, so as to revive all the controversy which it was the object of the agreement to put an end to.

Then, my Lords, the question arises, whether there may be a charge of horning on such an agreement. The parties have stipulated that there may be a charge of horning. That throws upon the suspender the shewing clearly, that by the law of Scotland such a process is incompetent. I think he has entirely failed in that. It appears to me clear, that, according to the law of Scotland, there may be this summary diligence when there is a sum of money to be paid, which may be rendered certain. It may be for payment of a sum of money, or *ad factum prestandum*. What is it he seeks by this charge of horning? He seeks, by this charge of horning, that an account shall be rendered; secondly, that the books shall be produced; thirdly, that one shilling per ton shall be paid; fourthly, that the penalty shall be paid. I conceive, that according to the well established practice of the law of Scotland, there may be summary diligence for all those objects.

Then, what is the ground of the suspension? It certainly lies upon the suspender to state some ground on which he calls upon the Court to interpose to prevent the charger having the benefit of his process. The only ground, the real ground, alleged, is, that the use that has been made of the hot air has not been according to the patent. There is no denial of having used hot air; there is no denial that it has been used in the same manner as it had been before 1833; but it is simply an allegation, and comes to this in substance, that it is not a use of hot air coming within the patent. But the object of the agreement was to put an end to that question: and, on the construction of the agreement, I am of opinion, that there is no ground at all for the suspension; and farther, I am of opinion, that letters of horning might issue.

Then, with regard to whether the penalty can be recovered in addition to the shilling per ton, I beg it to be understood, that I give no opinion at all. I am of opinion that the question does not arise here. The suspender does not come forward and allege, as a ground for the suspension, that he has been charged the shilling per ton, and the L.500 penalty. If that had been the ground of his calling on the Court to interpose, they no doubt would have decided it: but, I apprehend, it is not necessary for the House to pronounce any thing upon that.

It appears to me, that the suspender has no right at all to the interposition of the Court, and that, therefore, the interlocutor disposing of that suspension ought to be affirmed.

Mr Solicitor General. — Your Lordships, I trust, will give us the costs of this appeal.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed with costs.

ARCHIBALD GRAHAM. — ROY, BLUNT, and Co. Agents.

[*March* 22, 1842.]

The EDINBURGH and DALKEITH RAILWAY COMPANY, and their CLERK, *Appellants.*

JOHN WAUCHOPE, Esq., of Edmonstone, *Respondent.*

Statute. — Construction of.

Id. — The efficacy of a private Act of Parliament is no way dependent on the circumstance of previous notice of the intention to apply for it having been given to the parties whose rights are affected by it.

Acquiescence. — Dealings between parties held not to alter their rights between each other.

IN 1826, the appellants were incorporated by the act 7th Geo. IV., cap. 98, for the purpose of forming a railway between the city of Edinburgh and the village of Dalkeith. The appellants, in obtaining this act, were opposed by the respondent, through whose grounds the projected railway was intended to run. This opposition was withdrawn upon a compromise between the parties, which will appear from some of the sections of the act about to be detailed. The 22d section enacted, "that in order "to compensate the said John Wauchope of Edmonstone, Esq., "for carrying the said railway through his property, the said "company shall, and they are hereby required, (in addition to "the value of the ground to be occupied by the said railway, to "be ascertained and paid in manner hereinafter mentioned,) to "pay to the said John Wauchope, within six months after the "passing of this act, the sum of L.670; and also to pay to the "said John Wauchope, and his heirs and successors in the lands "and estate of Edmonstone, so long as the said railway shall

" continue to be used through the said lands, grounds, or other " premises of the said John Wauchope, the sum of one half- " penny per ton, upon all goods and articles upon which a " tonnage-duty is chargeable or charged in virtue of this act, " which shall pass along any part of the said railway, situated " within the said lands, grounds, and other premises of the said " John Wauchope, excepting the coals and other minerals, corn " and other articles, the produce of the said lands and estate; " and manure, lime, or other articles belonging to, or for the " use of, the said John Wauchope, or his heirs and successors, " in the said lands and estate, or of their tenants or occupiers " residing on the same; and which sum of one halfpenny per " ton, shall be payable by the said company to the said John " Wauchope, and his said heirs and successors, half-yearly, at " the terms of Whitsunday and Martinmas, beginning the first " payment thereof at the first term of Whitsunday or Martin- " mas which shall happen after the collection of rates and duties " on the said railway shall have begun to be made."

" Sect. 85. And, in consideration of the great charge and " expense which the company of proprietors for executing this " act must incur and sustain in making and maintaining the said " railway, and branches thereof, and other works hereby autho- " rized to be made and maintained, be it farther enacted, That " it shall and may be lawful for the said company of proprietors, " from time to time, and at all times hereafter, to ask, demand, " take, recover, and receive, to and for the use and benefit of " the said company of proprietors, for the tonnage and convey- " ance of all minerals, goods, wares, merchandise, and other " things which shall be carried or conveyed upon the said rail- " way and branches, or upon any part thereof, the rates and " duties hereinafter mentioned, that is to say:

" For all stone for the repairs of any turnpike-roads or bridges, " except the turnpike-roads and bridges within the Dalkeith

" district of roads, of the county of Edinburgh, or other public " streets, roads, or highways, such sum as the said company of " proprietors shall, from time to time, direct and appoint, not " exceeding the sum of fourpence per ton per mile:

" For all coal, coke, culm, and for all stone, (excepting stone " for the building or repair of bridges on the turnpike-roads " within the Dalkeith district,) cinders, chalk, marl, sand, lime " clay, ashes, peat, limestone, pitching and paving stone, (not " being for the repair of any turnpike-roads, or other public " streets, roads, or highways,) ironstone or other ore, and other " minerals, and bricks, tiles, slates, and all gross and unmanufac- " tured articles and building materials, and for all sorts of " manure, and all sorts of grain, flour, meal, potatoes, hay, and " straw, which shall be borne or carried along the said railway, " such sum or sums of money respectively as the said company " of proprietors shall, from time to time, direct and appoint to " be taken for the tonnage of any or either of the said kind of " goods, not exceeding fourpence per ton per mile:

" For every carriage conveying passengers, or goods or parcels, " not exceeding five hundredweight, such sum and sums of " money respectively as the said company of proprietors shall, " from time to time, direct and appoint to be taken, not exceed- " ing sixpence per ton per mile:

" And for all other goods, commodities, wares, and merchan- " dise whatsoever, carried on the said railway, such sum or sums " as the said company of proprietors shall, from time to time, " direct or appoint, not exceeding sixpence per ton per mile:

" For all goods, commodities, wares, and merchandises, articles, " matters, and things whatsoever which shall pass the railway " bridge to be erected over the river North Esk, at Eskbank, in " addition to all other rates and duties, such sum as the said " company of proprietors shall, from time to time, direct and " appoint, not exceeding the sum of fourpence per ton, until the

"sums raised at such railway bridge shall exceed the original "cost of such bridge, and of the annual expense of maintaining "and repairing the same, and of interest at five pounds per "centum per annum upon such outlay; after which the said "company of proprietors shall be entitled only to levy at such "railway bridge such a sum as shall be necessary for the annual "maintenance and repair of such bridge:

"For all goods, commodities, wares, and merchandise, articles, "matters, and things whatsoever which shall pass the railway "bridge to be erected at or near Cowpits, over the river Esk, in "addition to all other rates and duties, such sum as the said "company of proprietors shall, from time to time, direct and "appoint, not exceeding the sum of fourpence per ton, until the "sums raised at such railway bridge shall exceed the original "cost of such bridge, and of the annual expense of maintaining "and repairing the same, and of interest at five pounds per "centum per annum upon such outlay; after which the said "company of proprietors shall be entitled only to levy at such "railway bridge such a sum as shall be necessary for the annual "maintenance and repair of such bridge:

"For all the articles, matters, and things which shall pass the "inclined planes upon the said railway by means of a stationary "steam-engine, or other machinery, in addition to all other "rates and duties, such sum, as the said company of proprietors "shall, from time to time, direct and appoint, not exceeding the "sum of one shilling per ton, for each such inclined plane, pro-"vided that not more than two inclined planes are erected and "used upon the said railways betwixt the city of Edinburgh and "the village of Hunter's Hall."

"Sect. 99. And be it farther enacted, That if any difference "shall arise between any collector of the said rates and the "owner or person having the charge of any waggon or other "carriage, or the owner of any goods or other things, it shall be

" lawful for any such collector to stop and detain any such " waggon or other carriage, and to weigh, measure, or gauge " such waggon or other carriage, and all such goods or other " things as shall be therein contained respectively; and in case " the same shall, upon such weighing, measuring, or gauging, " appear to be of greater weight or quantity than what is set " forth and contained in the account given thereof as aforesaid, " then the owner or person giving in such account shall pay the " costs and charges of such weighing, measuring, and gauging; " all which said costs and charges, upon refusal of payment " thereof upon demand, shall and may be recovered and levied " by such ways and means, and in such manner as the said rates " are hereby appointed to be recovered and levied; but if such " goods or other things shall appear to be of the same or less " weight or quantity than the same shall, by such account, " appear to be of, then the said collector shall pay the costs and " charges of such weighing, measuring, and gauging, and also to " pay to such owner or person, or to the owner or owners of " such goods or other things, such damages as shall appear to " have arisen from such detention; and, in default of immediate " payment thereof by the collector, the same shall be recovered " from the said company of proprietors by distress and sale of " the goods and effects of the said company or of their col- " lector."

The powers of the appellants were enlarged by the 4th and 5th Will. IV. cap. 98, which recited the 7th and 10th Geo. IV. and contained the following among other sections:—" 1. That " all the powers, authorities, provisoes, regulations, directions " privileges, penalties, forfeitures, clauses, restrictions, matters " and things whatsoever contained in the said recited acts, ex- " cept in so far as the same are altered, varied, or repealed, shall " extend, and be construed to extend to, and operate and be in " force for carrying this act into effect, as fully and effectually

" to all intents and purposes, as if the same and every part " thereof were repeated and re-enacted in this act, and were " made part thereof; and the said recited acts, and this act, " shall, as to all matters and things whatsoever, except as afore- " said, be construed as one act."

" Sect. 16. And whereas by the said first-recited act, 7th " Geo. IV., certain way-leaves were granted to Andrew " Wauchope of Niddrie Mareschall, and John Wauchope of " Edmonstone, and their heirs and successors in their respective " estates, and their tenants or occupiers residing on the same, " and to Sir Robert Keith Dick of Prestonfield, Baronet, and " his heirs and successors in the estate of Prestonfield; Be it " farther enacted, That it shall and may be lawful for the said " company of proprietors, or their committee of management, if " they shall see fit, to uplift and collect the said way-leaves, or " any of them, separately from the rates and duties levied at the " time upon the said main line of railway or branches thereof, " provided that such rates so levied, and such way-leaves to- " gether, shall not exceed the rates and duties authorized to be " levied by the said two recited acts, and this act."

" Sect. 29. And be it farther enacted, That the rates and " duties by the said recited acts granted for, and in respect of, " carriages conveying passengers shall be, and the same are " hereby repealed."

" Sect. 30. And be it farther enacted, That it shall and may " be lawful to and for the said company of proprietors, in re- " gard to the main line and branches thereof, and to and for the " said proprietors of the Leith Branch Railway, in regard to " such branch and the extension thereof, to demand, receive, and " recover, to and for the use and benefit of the said company of " proprietors, and proprietors of the said Leith Branch Railway " respectively, for, and in respect of passengers, beasts, cattle, " and animals conveyed in carriages upon the said railway and

" branches, and for, or in respect of, the several matters and " things herein after mentioned, any tolls, rates, or fares, not " exceeding the following, (that is to say :)

" For every person conveyed in or upon any such carriage, " any sum not exceeding threepence per mile :

" For every person conveyed in or upon any such carriage, " for ascending or descending the Edinburgh inclined plane, an " additional sum not exceeding threepence :

" For every horse, mule, ass, or other beast of draught or " burden ; and for every ox, cow, bull, or neat cattle conveyed " in or upon any such carriage, any sum not exceeding sixpence " per mile ;

" For every calf or pig, sheep, lamb, or other small animal " conveyed in or upon any such carriages, any sum not exceed- " ing threepence per mile :

" For every carriage, of whatever description, not being a " carriage adapted and used for travelling on a railway, and not " weighing more than one ton, carried or conveyed on a truck " or platform, any sum not exceeding one shilling per mile :

" For the use of every machine, for the loading or unloading " of ships or vessels, any sum not exceeding twopence per ton.

" Sect. 31. Providing always, and be it farther enacted, That " in all cases where any passengers, cattle or animals, shall be " conveyed on the said railway or branches for a less distance " than two miles, the said company of proprietors, or proprietors " respectively, are hereby empowered to demand and receive the " afore-mentioned tolls, rates, or fares, as the case may be, for " two miles, how short soever such distance may be."

" Sect. 33. And be it farther enacted, That it shall be lawful " to and for the said company of proprietors, in regard to the " said main line and branches thereof, and to and for the said " proprietors of the said Leith Branch Railway, in regard to " such branch and the extension thereof, and they are respec-

" tively hereby authorized to provide and establish carriages, " and to convey upon the said railway and branches all such " passengers, cattle, and other animals, goods, wares, and mer- " chandise, articles, matters and things as shall be offered to " them for that purpose, and to make such reasonable charges " for such conveyance as they may, from time to time, deter- " mine upon, in addition to the several rates, tolls, or fares by " the said recited act, and this act authorized to be taken."

" Sect. 37. And be it farther enacted, That it shall and may " be lawful for the officers or collectors appointed by the said " company of proprietors, and the said proprietors of the Leith " Branch Railway within their respective limits, to weigh all " waggons and carriages passing on the said railways and " branches thereof, as often as may to them, the said officers " or collectors, appear necessary for determining the weight of " goods carried in such waggons or carriages; and no charge " on account of delay or loss of time shall be payable to the " owner of such waggons or carriages on account of such weigh- " ing; and the person or persons in charge of all waggons and " carriages shall place them upon any of the common weighing " machines, and other machines of the branch proprietors, and " assist in the weighing of the same when required to do so by " any of the company's or proprietors' officers, under a penalty " of forty shillings, to be paid by the party offending for each " offence."

The railway came into use in October, 1831, and the first payment to the respondent, in respect of his right of compensation under the statute, was made at Martinmas, 1832, upon a letter from the manager for the appellants, to the agent of the respondent, saying, " I have to intimate to you, that the number " of tons of goods which have passed through any part of the " Edmonstone estate, chargeable with the Edmonstone way- " leave, have, during the six months ending yesterday, been

" 12,981, which, at one halfpenny per ton, give L.27, 0s. " 10½d.

Again, on the 16th May, 1833, the manager wrote to the agent of the respondent: — " The railway tonnage conveyed " through the Edmonstone estate, during the half year previous " to the 15th inst., has been 26,643, giving, at one halfpenny " per ton, L.55, 10s. 1½d." After deducting a sum due on another account, the letter continued, " After you have satisfied " yourself of the correctness of the above balance, pray let me " know, and I will send it." On 20th May, 1833, the agent gave a receipt for the balance, as the " balance of tonnage for " the Edinburgh Railway to John Wauchope, Esq."

On 11th November, 1833, the manager wrote the agent, " I " have to intimate to you, that the number of tons of all articles " carried along the Edinburgh and Dalkeith Railway, through " the property of Mr Wauchope, during the half year ending " with last Saturday, has been 25,874, giving, at one halfpenny, " L.53, 18s. 1d.;" and, after making certain deductions, the letter continued, " which balance I shall be ready to pay when " you have satisfied yourself of its accuracy." On the 16th November, 1833, the agent gave a receipt for " the balance of " the amount of tonnage due to J. Wauchope, Esq., for railway " leave through his estate."

On the 16th May, 1834, the manager wrote the agent, " I " have to intimate to you, that the tonnage conveyed along the " railway through the Edmonstone estate amounts to," &c. And on the 31st May the agent gave a receipt for the balance of the amount stated, as " the balance of the tonnage dues due by the " said company to J. Wauchope."

On the 12th November, 1834, the manager wrote the agent, " I have to intimate to you, that the way-leave due by the rail- " way company to Mr Wauchope, for the half year ending this " term, is, on 32,136 tons at one halfpenny, L.66, 19s." On

15th November the agent gave a receipt for the balance of this sum, as "the balance due to J. Wauchope for way-leave."

Similar settlements to those detailed were continued by the parties, down to Martinmas, 1835, when the respondent made a demand to be paid way-leave on the tonnage of carriages conveying passengers along the railway, which was refused by the appellants. The respondent, in consequence, brought an action against the appellants, setting forth the 20th section of 7th Geo. IV. 98, and that part of the 85th section which related to the rate leviable by the appellants in respect of carriages conveying passengers, and concluding to have it found, that the appellants were bound to pay to him a halfpenny a ton on all carriages conveying passengers, which had passed along any part of the railway situated within his lands, since its completion, and that they ought to give an account of the tonnage of such carriages, and to pay what should be due in respect thereof, or otherwise, that they should be decreed to pay to him L.500, as the amount of this tonnage up to Martinmas, 1835.

A record was made up on the summons, defences, condescendence and answers, in which the pleas stated for the appellants were, 1st. That the respondent's way-leave was, by the statute, limited to a rate on "goods and articles," and could not be construed to include a duty in respect of the conveyance of passengers. 2d. That if the construction of the statute in this respect were doubtful, the understanding of the parties, as to its import, was established by the mode of accounting which had been adopted, and had been homologated by the respondent. 3d. That as the powers contained in 7th Geo. IV., in regard to dues chargeable for the conveyance of passengers, were repealed, and the dues were, at all events, not levied by the amount of tonnage, the respondent's claim could not be made effectual. 4th. That the claim was barred as to any arrears by the discharges granted. 5th. That they were not bound to keep accounts to ascertain the

amount of way-leave, but this the respondent must do at his own expense.

The pleas stated for the respondent were, 1st. That by 7th Geo. IV. the appellants were authorized to levy a rate of tonnage on all carriages conveying passengers, and he was entitled to a halfpenny per ton on the amount of this tonnage. 2d. That he had never abandoned his right in any way. 3d. That the 4th and 5th Will. IV. was ineffectual to deprive him of a vested right, seeing that no notice was given to him of the intention to apply for such an act.

On the 16th June, 1837, the Lord Ordinary (Cockburn) pronounced the following interlocutor, and added the subjoined note: — "The Lord Ordinary having heard parties, and considered the process, repels the defences, and decerns in terms of the two first conclusions of the libel, reserving consideration of the third or alternative conclusion, *hoc statu*, and until it be seen whether the defenders furnish the account demanded under the second conclusion: Finds the defenders liable in expenses; appoints an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and to report."

"*Note.* — The pursuer only gave, or was compelled to give, way-leave to the defenders, on this condition, as enacted in the statute originally establishing the company, (7th Geo. IV. cap. 98, sec. 20,) namely, that he was to receive 'one halfpenny per ton upon all 'goods and articles upon which a tonnage-duty is chargeable, or 'charged, in virtue of this act, which shall pass along any part of 'the railway situated within the lands of the said John Wauchope.' Now, the 85th section of this statute gives the defenders power to charge a tonnage-duty on 'every carriage conveying passengers.' It does not describe these carriages by applying to them the precise terms 'goods and articles,' which occur in the 20th section, but uses the words, 'for the tonnage and conveyance of all

" minerals, goods, wares, merchandise, and other things, 'which shall " 'be carried or conveyed upon the said railway.' But this (almost " imperceptible) difference is immaterial; because, besides using " these general words, the 85th section imposes a tonnage-duty " expressly on carriages carrying passengers; and it does so on the " declaration that such carriages come within the description of " goods, wares, merchandise, 'and other things' conveyed along the " railway. If a carriage carrying passengers be a thing conveyed " along the railway, it is difficult to see how it can be held not to be " one of the 'articles upon which a tonnage-duty is chargeable, or " 'charged, in virtue of this act.'

" If, therefore, the matter had stood solely on this first statute, " it would be clear that the halfpenny for way-leave was due on " this carriage. Nor would the Lord Ordinary consider the past " periodical settlements, by which the defenders say that accounts " have been adjusted without including this, as any abandonment by " the pursuer, or as any evidence that both parties hold it not to be " due. The substance of what was done was merely that the " defenders, having presented statements to the pursuer of what they " thought was due, he, relying on their accuracy, took and gave a " discharge for what was offered. These statements never disclose " what the tonnage is upon, but merely say that they include the " whole tonnage conveyed along the railway; and the way-leave, thus " said by the defenders to be due, is discharged. But if their " accounts did not contain all that they ought, the defenders cannot " take the benefit of their own errors of omission.

" But they say that the last statute, 4th and 5th Will. IV. cap. 71, " sec. 29, repeals the tonnage-duties on the carriages, and substitutes " direct fares from the passengers; from which it is inferred, that the " tonnage-duty being abolished, the carriages cease to be articles on " which, under the first act, the halfpenny for way-leave was due.

" The Lord Ordinary is by no means satisfied that due parlia- " mentary notice was given to the pursuer previous to the introduc- " tion of this last act. Undoubtedly, no notice was given to him " personally, nor did the public notices announce any intention to " take away his existing rights. If, as the Lord Ordinary is disposed

" to think, these defects imply a failure to intimate the real desig
" in view, he would be strongly inclined to hold, in conformity wit
" the principles of Donald, 27th November, 1832, that rights pr
" viously established by statute could not be taken away by a priva
" act, of which due notice was not given to the party meant to b
" injured. But it is not necessary to decide on this ground, becaus
" the two statutes are not inconsistent. For, in the first place, th
" first act lays the halfpenny for way-leave on all goods and articl
" upon which a tonnage-duty is chargeable, 'in virtue of this act
" Carriages for passengers was one of these; and the pursuer's int
" rest was fixed by reference to the tonnage-duties existing at th
" time he made his bargain. The company might afterwards g
" their arrangements with the public changed, as, for example, b
" giving up the tonnage-duty on several articles, or by conveying a
" goods gratis; but this did not necessarily impair the rights of th
" defender, who arranged in reference to the duties exigible at th
" time he dealt. In the second place, his rights cannot be take
" away by implication. Now, the last act repeals the rates an
" duties 'granted for, and in respect of, carriages conveying pa
" sengers,' that is, the rates exigible by the defenders from th
" public; but it does not repeal the way-leave payable by th
" defenders to the pursuer. These two things are quite different
" and the fact that no notice was given of any intention to subver
" the arrangement between the company and the pursuer, implie
" that no such design existed, and that the only object was to chang
" the arrangement between the company and the public.

" If the debt be due under the first conclusion, the account calle
" for under the second must plainly be furnished by the defender
" They were only entitled to pass the pursuer's lands on the condi
" tion that they were to pay him a halfpenny a ton for the way
" leave. The obligation to pay this implies the obligation to keep a
" account of the tonnage. It may be difficult or impossible to furnis
" such an account now, but this cannot affect the declaration of th
" rule in the first instance, though it may ultimately lead to th
" necessity of doing something under the third or alternative con
" clusion."

The appellants reclaimed against the foregoing interlocutor, but on the 14th December, 1837, the Court "adhered to the inter- "locutor reclaimed against."

Minutes and answers were then given in for the parties, and allowed to be seen and revised, but on 24th January, 1839, the Lord Ordinary, of consent, "recalled the interlocutors allowing "minute and answers to be seen, answered, and revised, and "appointed these papers to be withdrawn from the process; and "before answer ordained the defenders (appellants) to lodge an "account, in terms of the second conclusion of the libel."

Accordingly, the appellants gave in an account, stating the number of carriages which had been employed in the conveyance of passengers, the weight of each carriage, and the amount of rate payable to the respondent in respect of the aggregate amount of tonnage. The respondent objected to the account, that it did not include the weight of the passengers, as well as of the carriages which conveyed them.

On the 2d March, 1839, the Lord Ordinary pronounced the following interlocutor, adding the subjoined note: — "The Lord "Ordinary having heard the counsel for the parties, and con- "sidered the account lodged by the defenders, and the objections "thereto, finds, That in ascertaining what is due to the pursuer "for his way-leave on carriages conveying passengers, the ton- "nage-duty is to be taken as laid on the carriages, and not on "the passengers also; therefore, repels the objection to the said "account, and approves thereof, and decerns: Finds the pursuer "liable in this part of the discussion; appoints an account "thereof to be given in; and, when lodged, remits to the auditor "to tax the same, and to report."

"*Note.* — All that the former judgment did was to decide, that in "the words of the statute, the defenders were bound to pay for

" 'carriages conveying passengers,' but whether the duty was to be " laid on the carriages laden with the passengers, or empty, was not " decided, and in so far as the Lord Ordinary is concerned, was not " meant to be decided.

" This question has now arisen.

" The Lord Ordinary leaves the defenders' second statute (4th " and 5th William IV. chap. 7) entirely out of view, because the " pursuer's rights were fixed by the first act (7th Geo. IV. chap. 98,) " and were not taken away by the subsequent one. Now, the 85th " section of the first statute specifies all the articles or things on " which a tonnage-duty is chargeable in detail. It is always laid " upon the articles, and never on the carriages, with this single " exception, that when the case of passengers, and light goods or " parcels not exceeding five hundred weight, comes to be disposed " of, the phraseology is changed, and instead of being laid on these " contents of the carriages, it is laid on the carriages themselves, " that is, on the 'carriages conveying passengers," &c. The very " words do not admit of the pursuer's construction, which includes " the passengers as subjects of weight along with the carriage. The " carriage is the thing that the duty is laid on, and this construction " is fortified by the obvious difficulties and inconveniences of ascer- " taining the additional weight of passengers."

The respondent reclaimed against this interlocutor, and on the 4th July, 1839, the Court pronounced the following interlocutor:—" The Lords having resumed consideration of the " note and heard counsel, alter the interlocutor reclaimed " against, sustain the pursuer's objections to the account, No. " 43 of process, lodged by the defenders, and remit to the Lord " Ordinary to proceed accordingly, find the defenders liable " the expenses of the discussion relative to the said account, and " remit to the auditor to tax the account, and to report."

The appellants then gave in the following account:—

	T.	cwt.	qr.	lb.
The average weight of the carriages used in conveying passengers, as stated in the account previously lodged, is -	1	10	0	12⅕
Allowing twenty passengers on an average to each carriage, and assuming the average weight of each passenger to be 1 cwt. 2 qr. 9⅕lb., (or fifteen passengers to a ton,) the average weight of passengers in each carriage is - - -	1	6	2	18⅘
Gross weight of each carriage and passengers,	2	16	3	3

The number of passengers conveyed, as stated in the account previously lodged, is -	925,550	
And at the rate of twenty passengers to each carriage, the number of laden carriages is	46,277½	
Hence, 46,277½ carriages, at 2 t. 16 cwt. 3 qr. 3 lb., give - - -	132,574	Tons

At one halfpenny per ton = L.276, 3s. 11d.

On the 18th March, 1840, the Lord Ordinary pronounced the following interlocutor: — "The Lord Ordinary, of consent "of the pursuer, approves of the amended account, No. 51 of "process, decerns the defenders to make payment to the pur- "suer of the sum of L.276, 3s. 11d, as the amount of tonnage "on carriages conveying passengers which have passed along "the railway through the pursuer's lands, from the completion "of the said railway till the end of the year 1837, conform to "said amended account; and having heard parties' procurators "on the point of expenses, finds the defenders liable to the pur- "suer in the expenses incurred by him in this case, subsequent "to the decision of the Court, of date the 4th of July, 1839, "and decerns; appoints an account of said expenses to be

" given in, and remits the same to the auditor to tax an
" report."

The appellants reclaimed against this interlocutor, but on th 21st May, 1840, the Court, " of consent, refused the desire o " the reclaiming note, and adhered to the interlocutor reclaime " against."

The appeal was taken against the interlocutors of 16th June and 14th December, 1837, 29th June, 1838, 4th July, 1839 18th March, and 21st May, 1840. In the record below, it wa admitted on both sides, that the conveyance of passengers wa very little relied upon as a source of emolument to the appellant in the formation of the railway. But in the printed cases on th appeal, it was stated, that after the appellants had failed i inducing third parties to use the railway for the conveyance o passengers, they took this upon themselves, charging the pas sengers so much per head, even prior to the 4th and 5th W IV. by which act they first obtained power to make th charge.

The Solicitor-General and Mr Wilmore for appellants.— I. The 85th section of the 7th George IV. gave the appellan power to levy a rate on carriages conveying passengers, at s much per ton per mile, but it did not give them any power t levy a rate in respect of the passengers themselves; the levying a rate in that respect was not enjoyed by the appellants until th 4th and 5th W. IV. was passed. But this act, in its 16t section, expressly repealed the rates leviable under 7 G. IV The respondent says he cannot be affected by the 4th and 5t W. IV. because he had no notice of the intention to app for it.

[*Lord Brougham.* — That may be a good ground for repealin the act.

Lord Campbell. — It is not the first time that that doctri

has been broached, what countenance it has received is another matter.

Mr Attorney-General for respondents. — My Lords, I do not mean to argue that point.

Lord Brougham. — That 's a pity.]

Mr Solicitor. — Perhaps it had better be fully brought under your Lordships' notice, and be disposed of.

[*Mr Attorney.* — I certainly will not argue the point one way or another.]

Under the 7th Geo. IV. the appellants had no power to make a charge for passengers, by weight, or otherwise; all they could do was, under sect 85, to charge any body who might use the railway for the conveyance of passengers 6d per ton per mile on the carriages employed, but no tonnage was ever levied under this power while it remained in force; and by the 16th section of 4th and 5th W. IV. the power was taken away. Previous, therefore, to this last statute no tonnage was ever charged by the company in respect of passengers, and subsequent to that statute their charge has been not a tonnage-duty, but so much per head. The right of the respondent, however, under the 20th section of 7 Geo. IV., is to a rate upon "all goods or articles upon which "a tonnage-duty is chargeable" by the appellants. But no tonnage was leviable by the appellants under section 85, either upon passengers or small parcels; the 6d per ton allowed by that section applies to the carriages, not to passengers, or goods, or parcels; that this must be so is shewn by the 91st section, which declares that the rate upon small parcels shall not exceed 10d per ton. If the 85th section includes small parcels, the appellants would be entitled to levy a double rate, one under the 85th, and the other under the 91st, which plainly could never have been intended. If this be so, and the rate in the 85th section is on the carriage, exclusive of the small parcels upon the carriage, it must be equally exclusive of passengers, and then the rate is

confined to the carriage alone, and is not one to which the 20th section can have reference, so as to give the respondent any right of claim. The 85th section was not framed with a view to the right given to the respondent, but to the general rights of the appellants.

[*Lord Brougham.* — It would be framed with a view to sect. 20. If the company had no right to levy, Wauchope would not have any right to payment.]

By section 20th, Wauchope was entitled to a rate upon goods only, but not in respect of carriages. Throughout the act, carriages are never comprehended under the words "goods and "articles." Were it so, the company, under the rates in regard to the bridge over the Esk, and at Cowpits, and the inclined plane, would be entitled to levy two rates, one in respect of goods, and another in respect of carriages, which plainly never was intended.

II. But whatever may be the rights of the parties according to a strict literal interpretation of the statute, which it is very difficult to give to it, the settlements which have taken place between the parties, in which no claim has been made by the respondent for any rate, in respect either of carriages or passengers, conclusively ascertain their rights by their own understanding and agreement, and preclude the respondent from urging the claim upon which he insists, Bramston *v.* Robins, 4 *Bingh.* 11. No demand was ever made by the respondent until shortly before the commencement of this action, for a rate either upon carriages or passengers; the truth being that he, in common with the proprietors of railways generally, when the 7th Geo. IV. was passed, did not consider that passengers would yield any revenue; they did not, therefore, enter into the consideration either of the appellants or the respondent in the arrangements which were made for overcoming the opposition of the respondent to the passing of the act, and it never occurred to the respondent to

advance any charge in the settlements upon this subject, until, contrary to general expectation, experience shewed that the conveyance of passengers was the most lucrative branch of railway business.

[*Lord Cottenham.* — How have the appellants accounted since the act of William IV?]

In the same way as before.

[*Lord Cottenham.* — Because in that act you are not entitled to charge upon conveying passengers.]

Then if Wauchope was entitled under the 20th section of the first act, he is no longer so.

Mr Attorney-General and Mr Kelly for respondent. — I. The supposed unreasonableness of the respondent's claim cannot have any effect upon the question between the parties. The decision must rest upon the interpretation of the statute, which is neither more nor less than the agreement between the parties recorded by Parliament. By the 20th section the respondent was to have an allowance upon every thing for which the appellants could charge. By the 85th section the appellants were entitled to make a charge upon carriages conveying passengers; whatever charge, therefore, the appellants could make against the public under the 85th section, was subject to the respondent's allowance under the 20th section. That they, prior to the act of William IV., in truth made their charge by head, while they were yet only entitled to charge by tonnage, cannot have any effect upon the rights of the respondent. It is very true that the act of William IV. substituted the right to charge by head, but that was altogether applicable, as between the appellants and the public. This we say without at all arguing that the statute cannot have any effect upon the rights of the respondent, by reason of the want of notice, an argument we entirely disclaim. The act of William IV., though it altered the method of charge by

the appellants to the public, in no way, expressly or impliedly, dealt with the rights of the respondent under the former act As to them it was entirely silent.

[*Lord Brougham.* — By the first act your payment is to be out of sums leviable by the company, but if under the new act nothing was leviable, there was no fund of payment.]

Nothing but imperative necessity will induce the House to hold that the new act disturbed the rights of the respondent. Though the new act gave the appellants power to charge the public by a mode which under the first act they did not enjoy, still it did not take away their right to make a charge in respect of passengers, and therefore their liability on this account remains to the respondent, though the mode of ascertaining what is payable to him may be according to the original, and not the new mode of charge by the appellants.

[*Lord Campbell.* — What do you say would be the course of ascertaining what is payable to you ?]

By weighing; it may be inconvenient, but it is the contract of the parties. The rate payable to the respondent under the 20th section is upon all "goods and articles" on which the appellants may make a charge. By the 85th section, the appellants may charge upon carriages conveying passengers. Here carriages are mentioned in connection with passengers and goods, and this shews the reason why the term "articles" was used in the 20th section in addition to "goods," which would have been sufficient of itself, but for this, to embrace every thing upon which the company could make a charge.

By the 85th section, when the goods are heavy, the company are entitled to make a charge upon them alone; when they are light, they are not entitled to make a charge upon them, otherwise than by a charge upon the carriage conveying them. If the argument of the appellants were correct, they might carry many tons of small parcels, and make a charge upon them under this

section, and yet the respondent would not be entitled to any thing.

II. As to the understanding of the parties from the settlements which took place, there was nothing in the statements given by the appellants to raise any supposition in the mind of the respondent that carriages conveying passengers were not included. But even were it otherwise, the course of dealing was much too short to have the effect contended for.

Mr Solicitor-General in reply.

LORD BROUGHAM. — My Lords, undoubtedly we often feel considerable reason to hesitate in coming to a conclusion as to the construction of a private act of parliament, arising from the somewhat careless manner in which acts of this sort, as well as some other acts, are wont to be framed. Nevertheless, upon the whole, I think the construction is a sound one, which has been put upon this act of parliament by the Court below, namely, that one halfpenny per ton is to be taken upon all goods and articles upon which a tonnage duty is chargeable, or charged according to the act. Well then, in the 85th section we find, that every carriage conveying passengers is to be charged by, or to, or for the company, at a rate not exceeding sixpence per ton per mile; that therefore is a tonnage, and the question is, Is that tonnage to be taken upon the carriages, or is it to be taken upon the carriages conveying passengers? I apprehend that the sound construction, and the more natural construction is, that the tonnage is to be taken upon carriages conveying passengers, and that it will not be accurate to hold that the words "conveying passengers," are merely descriptive of the kind of carriage, but that it is indicative of the matters and things which are to be the subject of weighing, and to be in that respect subjected to a tonnage not exceeding sixpence a ton per mile. I therefore think that a sound con-

struction has been put upon the act, for it is also to be observ that the passengers or the company who escape, pay Wauchope so much per ton altogether, and in no other way it be taken.

With respect to the other objection which has been tak arising upon the 91st section, undoubtedly at first, till it came be examined into, it did seem to raise very great difficulty, and throw a great obstruction in the way of the interpretation, wh has been fixed by the Court below to the 85th section; but wh you come to look at it, it clearly appears that this is a rule wh applies entirely to the conveyance of goods by carriers using railway, and is intended to protect the customers of those carr from a larger charge by them against their customers than twe pence per ton; and it does not apply to the company themsel in carrying passengers, which they really do not appear to h had power to do at that period, nor until the act of the 4th 5th of William the IVth gave them the power. It is a gr mistake to suppose that they can as a company do, and that t are not prevented from doing, that which a company must be corporated for the purpose of doing.

The last point appears now to be abandoned on both sic It was repeated on the one side, and abandoned on the otl The principle seems to me to be clear, and I trust it will be considered in the Courts below, that no notice or want of no in a private act or a local act is any ground for holding that act does not apply; and it seems to me that that was very p perly entirely abandoned on the part of the respondents.

Lord Cottenham. — My Lords, upon the last point which been adverted to, it is only necessary to say a few words, in or that we may not again have a similar question brought bef this House. It has been most properly abandoned at the b but upon the papers and the opinions it does appear that an i pression has existed, that an act of parliament is or is not to b according as there may, or may not be, proof of the individ

to be affected by it, having had notice of the act of parliament whilst in progress.

Lord Brougham. — That the standing orders have not been complied with for protecting individuals, and not being complied with, that affects the act of parliament itself.

Lord Cottenham. — There is no foundation for such an idea; however, such an opinion appears to have existed in Scotland, but I hope it will cease to exist for the future.

With regard to the merits of the case, so far as they have been brought under our consideration, upon the first point that has been made by the appellant, I have already intimated an opinion that there is no doubt at all; whatever may be the rule by which the weight is to be found, that it falls under the 20th section, and if the words are attended to, I am surprised that any doubt should have existed, because the 85th section, (which imposes the duty upon the carriages,) describes the things to be charged as things which should be carried or conveyed upon the railway, upon which certain rates are fixed; and among the enumeration of those things upon which a rate is fixed, we find a carriage; and the 20th section gives Mr Wauchope the sum of a halfpenny per ton, upon all goods and articles upon which a tonnage duty is chargeable or charged, in virtue of this act, which shall pass along any part of the said railway; the sole argument must rest upon proving that that which in one section is called an article, is not such a thing as is described in the other. The doubt arises from the mode in which the weight is to be ascertained, and if the 91st section had imposed a toll upon the small parcels, as described in the 85th section, that would have furnished a very strong argument indeed in behalf of the appellant, but that section has, I think, no reference to the provision in the act which imposes tolls or duties to be paid as a remuneration to the company for the use of their railway.

Now passengers, if their weight is not to be included i
weight of the carriage, and these small parcels, of less tha
hundred pounds weight, (for I assume that to be the p
construction,) escape without payment altogether, because
is no provision by which passengers are to be the subject c
rate, or by which small parcels are to be the subject of the
the 91st section clearly not applying to the present s
matter. That is a strong reason for supposing that it coul
have been intended that passengers, and such small pa
should have been altogether omitted, the argument o
one side being, in fact, that it was included by being we
in the weight of the carriage, and, on the other side, it
contended that it was excluded by the 85th section, an
there was no other provision by which it was included.
ever imperfect the expression in the section is, it is
more consistent with the terms used to consider the v
of the carriage, as estimated by that which at the tim
upon it, than by its being estimated without reference to
was upon it. It is the weight of the carriage conveyin
passengers. So long as the carriage was conveying passe
there must be an additional weight to that which the ca
would have had if not conveying passengers, and the rate
be according to the terms of the section, "for every ca
"conveying passengers." Now there is no doubt, that if,
ordinary mode of expression, you were describing the weig
a carriage conveying passengers, you would consider th
carriage must be weighed with the passengers upon it, othe
it would be the weight of the carriage not conveying passe

My Lords, the provisions of the act are exceedingly an
ous, and no doubt extremely inaccurate, but, upon the wh
am of opinion, that the Court of Session has come to a
conclusion upon the construction of the act, and tha
Wauchope is entitled to his halfpenny per ton upon the v

of the carriage, with the addition, as it existed, of passengers upon it; and if what is stated at the bar be founded in fact, (though nothing appears upon the subject that I am aware of,) namely, that the company have actually paid to him at that rate upon these small parcels under five hundred weight, for the parcels of goods so carried, and for the carriages so carrying them, then it is a construction they themselves have put upon one portion of the 85th section, and they cannot be very much surprised that we have made it applicable to the conveyance of passengers.

Lord Campbell. — My Lords, I am entirely of the same opinion. The question seems to me to turn exclusively upon the construction of the act of the 7th of George the Fourth; and under the 85th section of the Act of Parliament, I am of opinion, that the company are entitled to receive tonnage upon the carriage with its contents, including the passengers; that upon every carriage conveying passengers, or goods, or parcels not exceeding five hundred pounds weight, the company was entitled to demand such sum and sums of money respectively, as the company of proprietors should, from time to time, direct to be taken, not exceeding sixpence per mile. I think that the carriage must be weighed with its contents, consisting of passengers or parcels. Then that being so, the question is, whether, under the 20th section of that act, this clause relating to carriages and parcels does not apply, and whether a carriage is not to be considered an article upon which a tonnage duty is charged or chargeable; and I am clearly of opinion it is such an article, and, therefore, that one halfpenny a ton, upon the sum received upon these carriages by the company, is payable to Mr Wauchope.

With regard to the arrears, there seems to be no reason in the world why the arrears should not be payable, because there has not been any acquiescence, for we know not that Mr Wauchope was aware of the circumstances. He took the accounts as they

were rendered to him, and there are no facts at all that bring this case within the case that was referred to from Bingham's reports.

My Lords, I think it right to say a word or two before I sit down, upon the point that has been raised with regard to an act of Parliament being held inoperative by a court of justice because the forms, in respect of an act of Parliament, have not been complied with. There seems great reason to believe that notion has prevailed to a considerable extent in Scotland, for we have it here brought forward as a substantive ground upon which the act of the 4th and 5th William the Fourth could not apply: the language being, that the statute of the 4th and 5th William the Fourth being a private act, and no notice given to the pursuer of the intention to apply for an act of Parliament, and so on. It would appear that that defence was entered into, and the fact was examined into, and an inquiry, whether notice was given to him personally, or by advertisement in the newspapers, and the Lord Ordinary, in the note which he appends to his interlocutor, gives great weight to this. The Lord Ordinary says, "he is by "no means satisfied that due parliamentary notice was given to "the pursuer previous to the introduction of this last act. Un- "doubtedly no notice was given to him personally, nor did the "public notices announce any intention to take away his existing "rights. If, as the Lord Ordinary is disposed to think, these "defects imply a failure to intimate the real design in view, he "would be strongly inclined to hold in conformity with the "principles of Donald, 27th November, 1832, that rights previ- "ously established could not be taken away by a private act, of "which due notice was not given to the party meant to be in- "jured." Therefore, my Lord Ordinary seems to have been most distinctly of opinion, that if this act did receive that construction, it would clearly take away the right to this tonnage

from Mr Wauchope, and would have had that effect if notice had been given to him before the bill was introduced into the House of Commons; but that notice not having been given, it could have no such effect, and therefore the act is wholly inoperative. I must express some surprise that such a notion should have prevailed. It seems to me there is no foundation for it whatever; all that a court of justice can look to is the parliamentary roll; they see that an act has passed both Houses of Parliament, and that it has received the royal assent, and no court of justice can inquire into the manner in which it was introduced into parliament, what was done previously to its being introduced, or what passed in parliament during the various stages of its progress through both Houses of Parliament. I therefore trust that no such inquiry will hereafter be entered into in Scotland, and that due effect will be given to every act of Parliament, both private as well as public, upon the just construction which appears to arise upon it.

Lord Brougham. — It ought to be observed, that the Lord Ordinary is not quite correct in the view he takes of the principle in the case of Donald. I do not agree with what is said as to the case of Donald; it does not go by any means so far; it is only used as a topic, as it were, in the construction of the act of Parliament, and I think, improperly used.

Lord Cottenham. — I move your Lordships that the interlocutor be affirmed with costs.

Ordered and Adjudged, that the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

ARCHD. GRAHAME — SPOTTISWOODE & ROBERTSON, Agents.

[Heard, 17th May, 1841. — Judgment, 9th May, 1842.]

HUGH BREMNER, Writer to the Signet, *Appellant.*

SIR GEORGE CAMPBELL and Others, executors dative nearest in kin of ANN MAXWELL, *Respondents.*

Cautioner. — A bond by a cautioner for a judicial factor, binding l self, his heirs, executors and successors, does not expire *ipso j* on the death of the cautioner, but will bind his representatives the intromissions of the factor had subsequent thereto.

Cautioner. — The septennial limitation will not affect the liability cautioner for the performance of an office, so long as the office tinues, and the extent of liability is unascertained.

Cautioner. — *Mora.* — Omission by the relatives of a lunatic to cor the actings of his curator throughout a series of years, will affect the liability of the cautioners for the curator.

Process. — Under a summons, seeking to make the defender liabl a universal representation under the passive titles, it is compe to decern against him on a limited liability.

Passive Titles. — *Minor.* — Whether the vitious intromission factor for a minor, will impose on the minor a liability, under passive titles, in respect of advances made by the factor for maintenance, education, and otherwise, *Query.*

THIS case was formerly heard upon appeal, and is reporte the 2d volume of *Shaw* and *M'Lean*, p. 895, under the Bremner *v.* Ker.

The facts of the case were shortly these: — In 1795, Ja Bremner was appointed factor to Mrs Maxwell, a lunatic, he and Hugh Bremner gave bond, binding themselves jointly severally, their "heirs, executors, and successors," that Ja Bremner should "do exact diligence in performing his dut "factor *loco tutoris* foresaid, and that in conformity to, anc "terms of the said Lords their Acts of Sederunt thereanen "all points."

James Bremner, the factor, continued in that office until his death, which happened on the 24th of June, 1826. Soon after his death, Ker was appointed curator *bonis* to the lunatic. During the whole period of his factorship, James Bremner had neither lodged any inventory of the lunatic's estate, nor annual accounts of his intromissions. On ascertaining this, Ker brought an action against the trustees of James Bremner, and obtained an interim decree against them for L.3941, 17s. 8d, as the balance of his intromissions with the lunatic's estate.

Hugh Bremner, the cautioner of James, died on the 20th day of February, 1804, leaving a widow and four children all in pupillarity, the youngest of whom was the appellant, then only two years of age. Francis, the eldest son of Hugh Bremner, died in infancy, shortly after his father. John, the next child, died in 1814, while in minority. Jessie, the next child, married Sanderson, and died, leaving one child, Grace Sanderson. The appellant was then the only child surviving.

At his death, Hugh Bremner left a deed, appointing Alexander Greig, and several other persons, tutors and curators to the children. These persons executed a deed of factory in Greig's favour. No one expede confirmation, or in any way perfected a legal representation to Hugh Bremner; but Greig, acting under the factory of his co-tutors, intermeddled with his estate, and realized funds to the amount of L.7486, 1s. 11d. Out of this, he paid debts owing by the deceased to the amount of L.3123, 3s. 2d., leaving a balance in his hands of L.4362, 18s. 9d. According to a state which was produced by Greig in the course of the action, which will presently be mentioned, it appeared that Greig had expended towards the maintenance, clothing, and education, of Hugh Bremner's widow and children, sums amounting to L.7910, 15s. 7d. while his expenses of management amounted to L.1309, 12s. 9d., shewing an expenditure of L.9220, 8s. 4d. or an excess of expenditure over L.4362, 18s. 9., the balance of his receipts amounting to L.4857, 9s. 7d.

In this state, Greig took credit for payments to the appellar to the amount of L.1511, 9s. 4d., and for money expended for h board, clothing, &c., to the amount of L.1440.

On the occasion of Jessie Bremner's marriage with Sanderson a deed had been entered into on the 8th April 1818, to which th appellant, his tutors and curators, Mr and Mrs Sanderson, an Greig, were parties. That deed narrated the death of Hug Bremner, the elder, intestate, the nomination by him of tutor and curators to his children, the appointment, by these tutor and curators, of Mr Greig as their factor, "with power to uplift "receive and discharge all debts and sums of money due, or to be "come due, to them, and to call, charge, and pursue for the same "and generally to do all acts and deeds with regard to the real "izing, securing, and managing of the means and estate of the said "deceased Hugh Bremner's children, which the said tutors and "curators could do themselves, or which to the office of factor i "similar cases, was known to belong." The deed then pro ceeded: "And considering that the principal proportion of th "said deceased Hugh Bremner's succession was contingen "upon the winding up of the affairs of a copartnery betwee "the since deceased Francis Farquharson, Esquire, of Haugh "ton, accountant in Edinburgh, and himself, which had sub "sisted for a number of years before his death, but which wa "terminated by that event; as also that owing to the natur "of the concern, and other causes, the affairs of the said co "partnery were not finally winded up during the survivance o "the said deceased Francis Farquharson, and that no settlemen "of accounts has hitherto taken place with his heir and repre "sentative, John Farquharson, Esquire, now of Haughton." The deed then narrated, that pending the settlement of ac counts, certain bonds had been granted for debts due to the com pany, as falling under the share of the profits belonging to Mr Bremner, but "subject to the result of an accounting and fina "adjustment with the heir of Mr Farquharson." That Greig

had advanced L.1000 to Mrs Sanderson, "and that with a view "to the reimbursement of any superadvances by the said Alex- "ander Greig, on behalf of the said deceased Hugh Bremner's "representatives, and for enabling him to realize their funds, "and to settle accounts with the heir of the said deceased "Francis Farquharson, it has been deemed expedient to con- "clude an agreement to the effect afterwritten: Therefore, the "said Hugh Bremner, junior, with the concurrence of his cura- "tors, and the said Janet or Jessie Bremner, with consent of the "said Thomas Sanderson, and he as taking burden for her, and "for his own right and interest, and both of them with one ad- "vice and assent, hereby agree and declare, that notwithstanding "the tenor of the foresaid bonds, and of the said marriage con- "tract, the said Alexander Greig is, and shall be intrusted with "the charge of settling accounts with the heir of the said deceased "Francis Farquharson, of uplifting the contents of the said "bonds, and of realizing the other means and estate of the said "deceased Hugh Bremner's representatives: And, accordingly, "the said other parties to this agreement hereby authorize and "empower the said Alexander Greig, for them and in their be- "half, to uplift, receive, recover, and realize the whole estate, "funds and effects of the said deceased Hugh Bremner, and his "representatives, and particularly, without prejudice to the said "generality, the contents of the beforementioned bonds, with "the interest due, or to become due, thereupon, and in their "names, or his own, to grant discharges, acquittances, or con- "veyances of the premises, in whole or in part, which shall be "sufficient to the receivers, to call, charge, and pursue, for re- "covery of the said estate, funds and effects, to compound, tran- "sact, and agree with relation to the premises, and in general to "do whatever is competent to the said other parties, or any of "them thereanent: Moreover, the said Hugh Bremner, junior, "with consent of his curators, and the said Janet or Jessie

" Bremner, with the consent of the said Thomas Sanderson
" hereby authorize and empower the said Alexander Greig t
" purchase brieves, and expede and retour services, to obtain c
" expede charters, precepts of *clare constat*, and instruments c
" sasine, to expede confirmations, to give up inventories, and t
" expede or obtain all other titles of whatever description, an
" grant all writs and deeds, which may be requisite for vestin
" the said Hugh Bremner, junior, and Janet or Jessie Bremner
" or either of them, with the estate, property, funds, or effects c
" the said deceased Hugh Bremner, Francis Bremner, and Joh
" Bremner, or any of them, or for realizing the said property
" funds, or effects, or any part thereof: Ratifying hereby an
" confirming whatever the said Alexander Greig may lawfull
" do, or cause to be done thereanent."

Ker being unable to recover payment of the sum in the decre obtained by him against Bremner's trustees, brought actio against the appellant, as heir served, or as charged to enter hei and him and his mother as executors confirmed to his father, c as vitious intromitters with his estate, or as representing him o one of the passive titles, concluding among other things, that th defenders should be decerned " to produce a full and particula
" state of accounts of the whole intromissions of the said decease
" James Bremner, as factor foresaid," and " to make payment t
" the pursuer of the foresaid sum of L.3941, 17s. 8d. sterling
" contained in, and due by the interim decree before recited
" together with the farther sum of L.10,000 sterling, or suc
" other sum, less or more, as shall appear to be the balance du
" by the said deceased James Bremner upon his said intromis
" sions, with the legal interest of said sums from the said 24t
" day of June 1826, being the date of his death, and during th
" non-payment."

Kerr also brought a supplementary action against the truste of Greig, who had died, and Grace Sanderson, the daughter c

Jessie Bremner, who had also died, and her father, Thomas Sanderson, as representing Jessie Bremner. From this action the Sandersons were assoilzied by an interlocutor on the 3d March, 1831.

In the original action, and the supplementary action, so far as directed against Greig's trustees, the proceedings which took place in the Court below are detailed in the report in *Wil.* and *Sh.* already referred to. The result of the judgment in the Court below was, — 1st, By an interlocutor on the 6th July, 1832, to repel an objection upon the form of Hugh Bremner's bond of caution for James Bremner, that it only bound him to warrant that the factor should do exact diligence for recovery of money due to the lunatic, but not that he should duly account for his receipts; and to remit to ascertain what was due by James Bremner at the death of Hugh Bremner, and what payments had been made by James subsequent to Hugh's death; 2d, By an interlocutor of the 17th December, 1835, to find the appellant liable for a balance of L.1033, 14s. 9d., due by James Bremner, at the death of the appellant's father, with interest; and, *quoad ultra*, to assoilzie the whole defenders; 3d, By an interlocutor of 19th December, 1835, to find Greig's trustees liable conjunctly and severally with the appellant for the L.1033, 14s. 9d., and to refuse expenses.

The order made upon an appeal and cross appeal from these interlocutors was in these terms: — "It is ordered and adjudged, "by the Lords spiritual and temporal in Parliament assembled, "That the said interlocutor of the 6th of July, 1832, (on report "of the Lord Ordinary, Fullerton) be, and the same is, hereby "affirmed, in so far as it 'repels the objections pleaded to the "'form of the bond granted by the late James Bremner as "'principal, and the late Hugh Bremner as cautioner, and "'remits to the accountant to ascertain what sum, if any, was "'due by James Bremner, as factor *loco tutoris* at the death of

" 'Hugh Bremner, and to report the result to the Court.' But
" this House doth not pronounce any judgment on the residue
" of the said interlocutor, the inquiry of the accountant being
" completed, and his report made to the Court upon both the
" matters remitted to him, this House holding the said bond to
" be valid and binding on Hugh Bremner, deceased, the
" cautioner, to the extent of the whole intromissions, adminis-
" tration, and management of James Bremner, in his character
" of factor *loco tutoris*; and that, consequently, Hugh Bremner,
" the cautioner, was, at the time of his death, liable to that
" extent under his cautionary obligation. And it is farther
" ordered, that so much of the said interlocutor of the 19th
" December, 1835, as refuses expenses, be, and the same is,
" hereby also affirmed. And it is farther ordered and adjudged,
" that the said interlocutor of the 17th December, 1835, the
" residue of the said interlocutor of the 19th December, 1835,
" and the whole cause, save and except so much of the said
" interlocutors of the 6th of July, 1832, and 19th December
" 1835, as are hereby affirmed, be, and the same are, hereby
" remitted back to the said Court of Session, and the said Court
" are hereby directed to cause the opinions of the whole Judges
" of both Divisions thereof, and of the Lords Ordinary, to be
" taken on the following questions arising in the said appeals,
" viz., on the question of the septennial prescription, and on
" the question of the several liabilities of Hugh Bremner,
" younger, Grace Sanderson, and Thomas Sanderson, and the
" said Alexander Greig, deceased, both in respect of,
" assuming the liability of the late Hugh Bremner, to be
" found by the said interlocutor of the 6th of July, 1832, or
" any other respect, regard being had to the statement of
" respondent's counsel at the bar of this House, that
" Bremner, the younger, was liable for the moneys received by
" him, after attaining twenty-one years of age, from the

"and effects of Hugh Bremner, the elder. And it is farther "ordered and adjudged, that the said Court of Session do pro- "ceed in the said cause as may be just and consistent with this "judgment."

The Court below decerned in terms of this judgment, and ordered cases on the points remitted for consideration.

In the case for the defenders they argued the following pleas: —

1st, That the bond of caution covered only the intromissions of the factor during the lifetime of the cautioner.

2d, That as the factory was a temporary office, the caution could not subsist for a longer period.

3d, That assuming the obligation to be so limited, the *media concludendi* of the action did not warrant decree against the defenders.

4th, That in regard to the defender, Hugh Bremner, the judgment appealed from was farther incompetent, as proceeding on a ground of liability different from that libelled on.

5th, That the claim as for a debt due at the death of the cautioner was barred by the septennial limitation.

6th, That it was also barred by neglect on the part of those whose duty it was to superintend the actings of the factor.

7th, That the arrears due at the death of the cautioner were extinguished by the factor's subsequent payments. —

Lastly, assuming the debt under the bond not to be extinguished, the defenders were in no respect vitious intromitters, or in any degree liable in that character.

Along with his case the present appellant printed a note given in by the respondents to the House of Lords on the former hearing of the cause, which was in these terms: — "It is respectfully "submitted, on the part of the respondents, that the judgment "of the House of Lords should be as against Mr Alexander "Greig's representatives, for L.6055, 14s., with interest thereon "from 24th June, 1826, being the sums found due in the action

" against James Bremner's representatives; and, as against Hugh " Bremner, for whatever sum he shall be ascertained to have " received from the estate of his father, Hugh Bremner, the " cautioner, after he (Hugh Bremner, the son) attained the " years of majority."

On the other hand, the pursuer, (present respondent,) argued: —

1. That the cautionary obligation undertaken by Hugh Bremner not having been recalled, continued in force till the termination of the factory by James Bremner's death in 1826, and remained as effectual against the estate and representatives of the cautioner, *subsequent to his death* in 1804, as it was against himself in his lifetime.

2. That there was no ground for the distinction founded on by the defenders, that *vitious intromitters* are not subject to this obligation, whatever liability might be held by law to attach to the proper heirs and representatives of the deceased cautioner.

3. That the defenders had so placed themselves in regard to the succession of the deceased by their intromissions, as to be responsible for the debt claimed by the pursuer, arising, as it did from the express obligation of the party with whose effects they had intromitted.

4. That the septennial limitation act had no application to the case, in whatever light the liability of the defenders under the obligation undertaken by Hugh Bremner should be regarded; whether it should be held to have terminated in 1804, or to have continued down to the factor's death in 1826.

5. That the claim against the defenders was not barred by *mora* or neglect.

6. That there was no room for the plea, that the balance due on the factorial accounts in 1804 was extinguished by subsequent payments, or that the effect of those payments was to diminish that claim to any extent.

The Court below, in conformity with the order of the House of Lords, required the opinions of the whole Court. That opinion, which was drawn by Lord Corehouse, but not signed by him, on account of indisposition, was in these terms: —

" Without resuming the facts of the case, or the proceedings " either in this Court or in the House of Lords, we proceed to " answer the questions proposed in the remit: —

" 1. The opinion of the Court is directed to be taken ' on the " ' question of the septennial prescription.' The act 1695, c. " 5, by which that prescription was introduced, provides, ' That " ' no man binding and engaging for hereafter, in any bond or " ' contract for sums of money, shall be bound for the said sums " ' for longer than seven years after the date of the bond.' It is " manifest that this act cannot apply to a bond of caution granted " for the faithful exercise of an office, because at the date of the " bond there is no specific sum due. The bond is not granted " for money at all, but to secure the performance of the officer's " duties; and though his malversation or neglect may give rise " to a claim of damages, which comes to be estimated in money, " the obligation of the principle in its nature is purely *ad factum* " *præstandum*. Farther, the limitation of the right of action " cannot be restricted to a period of seven years from the date " of the bond, because the office, as in this case, may be of inde- " finite endurance, and may exist for half a century. Accord- " ingly, the point is no longer open for discussion, having been " decided as early as the case of Fleet, January 5, 1709; and it " is laid down as settled law by all the authorities since the date " of that decision.

" The defenders try to evade the rule in this way. They say " that the cautionary obligation of Hugh Bremner the elder, " ended by his death in 1804; that the sum which was due in " consequence of the curator's intromissions might then have

" been ascertained; and that an obligation as for a liquid su
" ought in equity to be held as commencing at that period, a
" subject to the septennial prescription afterwards. We are
" opinion, for reasons which will be immediately stated, that t
" obligation of the cautioner did not end by his death, but w
" transmitted against his representatives. Farther, although
" had ended, which might have been the case if his represent
" tives had withdrawn from the suretyship, which, like himse
" they were entitled to do, the debt was not then liquidated, n
" any attempt made to do so, before the present action w
" raised. Lastly, although the debt had been liquidated at th
" time, as no new bond was granted for the sum, from the da
" of which the currency of the septennial prescription could co
" mence, there is no room for the operation of the statute.
" the cautioner or his representatives had wished to have t
" benefit of the Act 1695, the course which they ought to ha
" followed was obvious. They ought to have intimated th
" they withdrew their security; a settlement of accounts wo
" then have taken place; the sum for which the factor was liab
" would have been ascertained; and for that specific sum he a
" his cautioners should have granted a bond. In that way t
" original obligation would have been extinguished by novatio
" and that which was substituted in its room would have be
" valid for seven years only from its date. But the present q
" tion is exclusively laid on the original bond to execute the offi
" and it could be laid on no other ground, — a bond incapa
" of suffering the septennial prescription, and the amount
" liability under which is even yet undetermined. The cases
" Anderson and Moreland, to which the defenders have referr
" give no countenance to their argument. In Anderson's ca
" the cautioner was bound for the payment of a specific sum,
" under a composition-contract, and for nothing more, an o
" gation which falls expressly under the words of the statu

" and the case of Moreland did not relate to the septennial pre-
" scription at all.

" In answer to the first question, therefore, we are clearly of
" opinion that the claim of the pursuer is not extinguished by
" virtue of the Act 1695.

" II. The opinion of the Court is directed to be taken 'on
" 'the question of the several liabilities of Hugh Bremner the
" 'younger, Grace Sanderson and Thomas Sanderson, and the
" 'said Alexander Greig, deceased, both in respect of and
" 'assuming the liability of the late Hugh Bremner, to be as
" 'found by the said interlocutor of the 6th of July, 1832, and
" 'in any other respect, regard being had to the statement of
" 'the respondent's counsel at the bar of this House, that Hugh
" 'Bremner the younger was liable for the moneys received by
" 'him, after attaining twenty-one years of age, from the estate
" 'and effects of Hugh Bremner the elder.'

" It will be observed, that Grace Sanderson and Thomas
" Sanderson were called as defenders merely *pro forma*, and have
" long since been assoilzied by a final interlocutor. It is unne-
" cessary, therefore, to say any thing of their liabilities.

" Whether the statement of the pursuer's counsel at the Bar
" of the House of Lords implied an admission that Hugh Brem-
" ner the younger was liable no farther than for the moneys
" received by him after attaining the age of twenty-one years, it
" is for their Lordships to judge. As the minute given in by
" the pursuer's counsel is not before us, we shall assume that
" no such admission was made.

" With regard to Hugh Bremner the younger, the first point
" for consideration is, Whether the cautionary obligation un-
" dertaken by his father ended at his father's death? We are
" of opinion that it did not, but that it was transmitted against
" his representatives. The words of the bond itself appear to us
" conclusive upon this point. The factor, and Hugh Bremner

" the elder, his cautioner, 'bind and oblige us, jointly and
" 'severally, our heirs, executors, and successors whomsoever,
" 'that I, the said James Bremner, shall do exact diligence in
" 'performing my duty as factor *loco tutoris* foresaid.'

" Farther, it is a general rule in the law of Scotland, that all
" obligations undertaken or incurred by the ancestor transmit
" against his representatives. There are some exceptions to
" that rule: for example, penal actions do not transmit, unless
" there has been litiscontestation in the lifetime of the ancestor.
" There are others which it is unnecessary to mention, because
" they have no connection with the present case. Under the
" term 'obligation,' is comprehended not only pure debts, that is,
" sums of money due and payable at the ancestor's death, but
" future and contingent debts; also all burdens or liabilities to
" which he is subject, either as principal or cautioner. In the
" case of heirs and executors properly so called, the extent of
" the obligation so transmitted is or may be limited; for if the
" heir enters *cum beneficio inventarii*, or if the executor is regu-
" larly confirmed, neither is bound beyond the amount of the
" inventory. But if these precautions have been neglected, the
" representation is universal and unlimited.

" To get quit of this responsibility, which the express words
" of the bond of caution, as well as the general principle of the
" law of succession, imposed upon him, Mr Bremner, junior,
" has resorted to various pleas, all of which, in our opinion, are
" groundless.

" He maintains, that an obligation undertaken by the cautioner
" for the performance of an office, is one out of which no claim
" arises until a violation of the duty has been committed; and
" there was no violation of duty in this case before the death of
" the cautioner, there was no obligation then existing which
" could transmit against his representatives. In support of this
" plea, passages are cited from Stair and Erskine, in which it

"said that conditional obligations are but obligations in hope, "and do not begin to oblige until the condition exists.

"The obvious answer is, that the defender is here confound- "ing the consequence of an obligation with the obligation itself. "The cautioner for the performance of an office cannot be "called upon to pay any thing until the duties of the office have "been neglected or transgressed. But the obligation to pay "when that contingency arises, exists from the date of his bond. "The responsibility is undertaken at that time, and it is that "responsibility which transmits from the ancestor to his repre- "sentatives. Accordingly, there is not only no authority to be "found in the books, that obligations of this kind do not stand, "in respect of transmission, in the same situation with every "other species of obligation, but there is a long and uninter- "rupted series of decisions by which the reverse is established.

"The citations from Stair and Erskine to which the defenders "refer, are plainly misapplied. Both authors, in the passages "quoted, are treating of the incompetency of raising the dili- "gence of inhibition upon contingent debts; and they state "what in the ordinary case is manifest, that it would be incon- "sistent with equity to place the heritable property of a contin- "gent debtor under an embargo, and to deprive him of the "use of it for an indefinte period, while it was yet uncertain "whether he would ever have any thing to pay to his contingent "creditor. Accordingly, inhibition is always recalled in such "circumstances, unless the debtor is bankrupt, or *vergens ad* "*inopiam*. But although a contingent debt is in the general "case not a good ground for that diligence, there is no reason "why a contingent obligation should not be transmissible like "any other obligation against representatives.

"It is unnecessary to detail all the precedents upon this point. "They are stated at great length in the pleadings for the pur- "suer; and we think the defender's attempt to explain them

" away, has been eminently unsuccessful. We shall advert to
" some of those cases in the sequel.

" It appears from what passed in the House of Lords, that
" the defender, in aid of his argument, had referred to a maxim,
" that representation in moveable goods is unknown in the law
" of Scotland. There is indeed such a maxim, but it is entirely
" foreign to the matter now under consideration. When we
" say, that there is no representation in moveables, we mean
" that succession in moveables proceeds *per capita*, and not as in
" heritage, *per stirpes*. If a man has three daughters, and one
" of them predeceases him, leaving a child, the child comes into
" the mother's place, and gets the same share of the heritage as
" her mother would have had. It is not so in moveables. In
" the case put, the two surviving daughters would be the only
" executors, while the child of the predeceasing daughter would
" take nothing: or to state it in the antiquated, but perspicuous
" language of Sir Thomas Hope: — ' In testaments *non est jus*
" ' *representandi*, as there is in lands, and heritage; but the
" ' nearest in degree of kindred excludes all others of a farther
" ' degree, albeit more near *quoad successionem* to lands an
" ' heritages; for in heritage there is *jus representandi*, and th
" ' son, oye, &c. has the same place or right that their fath
" ' had; but, in testaments, the father-brother, or father-sist
" ' will exclude all the brethren and sisters' bairns, and will h
" ' the sole benefit of the executry.' But while the successor
" the executor do not represent him actively, that is to say,
" not entitled to his rights and privileges, nothing is more
" tain than that they represent him passively, or, in other w
" are responsible for his debts and liabilities.

" But the main plea on which Mr Bremner relies is, th
" is not sought to be subjected as the heir or executor
" father, but on the passive title of vitious intromission w
" father's estate. He maintains, that whatever may be t

" as to heirs and executors, the vitious intromitter is liable only " for debts payable by the deceased at the period of his death, " and he says that no debt was payable when his father died, " because there had been no violation of duty by the judicial " factor at that time; that although a current and unprestable " obligation may transmit against heirs and executors, there is " no authority for holding that it transmits against vitious intro- " mitters; and that the words of the bond, by which his father " imposed the cautionary obligation, not only upon himself, but " his heirs, executors, and successors, does not comprehend those " who are sued on this passive title.

" We are of opinion, that not one of these propositions is " well founded. It is true, that the liability of a vitious intro- " mitter is not exactly co-extensive with that of an executor. " For example, as this passive title was introduced for the pro- " tection of creditors, it is not available to donees. On that " ground, legatees, or children for provisions purely gratuitous, " cannot take benefit by it; nor can widows for their *jus relictæ*, " or children for their *legitim*, because they are not creditors, " but held to have joint rights in the estate of the deceased with " his representatives. But, in other respects, a vitious intro- " mitter stands in the same relation to creditors as an executor " unconfirmed. It is true that both Stair and Erskine use the " expression, that vitious intromitters are liable *in solidum* for the " debts of the defunct. But it will be observed, that the term " ' debt ' is taken in these passages in its most extensive sense, " comprehending not only debts due, and prestable at the death " of the ancestor, but all obligations and liabilities whatever. It " has the same signification as in the Roman law; — ' *Hoc verbum* " ' DEBUIT *omnem omnino actionem comprehendere intelligitur;* " ' *sive civilis, sive honoraria, sive fideicommissi fuit persecutio.*' " Therefore Mr Bell, with strict correctness, says: — ' When- " ' ever any one, having access to the effects and moveable

" ' estate of a person deceased, unwarrantably takes possession
" ' of, and intermeddles with those funds, the law infers a uni-
" ' versal responsibility from the uncontrolled intromission.' It
" may be added, that nearly two centuries and a half have
" elapsed, since it was settled in the law of Scotland, that in
" questions with creditors, the liabilities of the vitious intromitter
" are as extensive as those of the executor, while he has not the
" protection which a confirmation duly expeded gives to the
" latter. ' Ante hunc confirmationem,' says Craig, ' si se bon-
" ' orum administrationi commiscuerit universalis tum habetur
" ' intrommissor, in eumque non minus quam in verum execu-
" ' torem *omnes actiones, competunt;* ipse tamen agere non
" ' poterit, donec in executorem fuerit confirmatus' — ' itaque
" ' executor nomen juris est, intromissator nomen facti: hic in
" ' solidum pro debitis hereditatis tenetur, ille tantum pro viribus
" ' hereditatis.'

" The defender having laboured to prove that the transmis-
" sion of a prospective cautionary obligation against the heir and
" executors of the cautioner, arises solely from the circumstance,
" that it is imposed in express terms in the bond of caution, the
" principal binding not only himself, but his heirs, executors, and
" successors, tries to escape upon the plea, that he, as a vitious
" intromitter, is neither heir, executor, nor successor, and
" therefore not falling under the words of the bond. But this
" pretence is singularly unfortunate; for we are told by the
" author last quoted, that the term successor in such obligations
" applies especially to intromitters. Speaking of adjudication as
" a depending action, he says, ' Itaque si alterius persona morte,
" ' vel rebellione, vel juris cessione mutata sit, et actionem vel
" ' hæres, vel executor, vel successor (quem intromissorem dici-
" ' mus,) vel quilibet alius particularis successor, qui jus actionis
" ' nactus fuerit ex ea sententia, velit ad actionem procedere
" ' non potest,' &c.

"If an express obligation, therefore, were requisite, which "we do not consider it to be, it is clear that Hugh Bremner the "elder, under the designation of 'successors,' imposed an obliga- "tion on vitious intromitters, as well as every other species of "successor, not included in the terms heir and executor.

"But it is farther pleaded, in point of fact, that the defender, "Hugh Bremner the younger, is not to be held as a vitious in- "tromitter. Certainly there would be room for that inference, "if his intromission had been confined to the advances made to "him out of the estate before he attained the age of fourteen "years.

"No pupil can be a vitious intromitter, because such intro- "mission is a delinquency which a pupil is incapable of com- "mitting. A defence of somewhat the same nature might have "been urged also, if the intromission had taken place during "the defender's minority; for though he would thereby have "been rendered liable in the first instance, he might have ob- "tained relief by a *restitutio in integrum* raised during his "minority, or the *quadriennium utile* which followed it. In "both cases his liability could not have extended farther than "in *quantum lucratus fuit.* But neither of these pleas is sup- "ported by the fact. The intromission of his guardian, of which "he had the benefit, was neither confined to his pupillarity nor "minority; no action of reduction or restitution was brought "within the *anni utiles;* and what is of still more importance, "it appears from Mr Greig's accounts, that the intromission "was continued by the defender, Bremner, himself for several "years after he had attained majority. He took benefit from "his father's succession to the amount of L.1511, 15s. 4d.; part "of that was board, at the rate of L.60 per annum, for the "period of twenty-four years, during three years at least of "which period, therefore, he was of age. In the years 1823, "1824, and 1825, after he attained majority, he received nearly

" L.900 from his father's estate. As an intromitter, therefore, " of full age, he neither was nor could be restored against his " own acts, and he is in exactly the same situation as if he had " been major at his father's death. Neither is there the slightest " pretence for pleading a colourable title, on the ground that " Mr Greig, from whom he received these sums out of his father's " estate, had been his tutor and curator; for Mr Greig's intro- " missions did not merely proceed from his office of tutor or " curator, but the defender, Bremner, granted also a commission " to Mr Greig to uplift the whole estate, funds, and effects of " his father, an act against which he never sought or obtained " restitution. This, therefore, is a manifest case of intromission " by a person of full age, and which inferred a universal repre- " sentation.

" There are other pleas on the part of Mr Bremner to which " it is scarcely necessary to advert. Thus, we are of opinion " that the claim against the defenders is not barred by *mora* " or neglect. The lunatic could not call the parties to account, " and it is not clear that any of her relations had either title or " interest to do so. The case is altogether different from that " of a judicial factor in a process of sequestration or ranking and " sale, acting for behoof of a body of creditors, and under their " control. It is their duty to see that the factor executes his " office correctly, and if they neglect to do so for a long period " or abandon it altogether, it is possible the cautioner may have " grounds for pleading a personal exception against them. It is " otherwise with the judicial factor of a lunatic.

" Still less is there room to argue that the balance due " the factorial accounts at the cautioner's death was extin- " guished by subsequent payments. The balance due in 18 " went on from year to year increasing.

" Equally unavailing are the objections of the defenders " the form of the action. They say that Hugh Bremner

" younger, voluntarily undertook the obligation of cautioner at " his father's death, because he did not withdraw from it, which " he had a right to do, and therefore the summons ought not to " have been laid on the passive title of vitious intromission, but " on the ground that he was *lucratus* by the succession. We are " of opinion, that the defender Bremner was a vitious intro- " mitter; that the summons was correctly laid on that title, and " could be laid on no other ground, for it was in consequence " of his intromission alone that he became liable for his father's " obligation as cautioner, and exactly to the same extent as his " father was liable; and that the restriction of the claim (assum- " ing it to have been restricted) whether by the consent of the " pursuer, or on some equitable consideration, is no impeachment " of the competency or correctness of the summons.

" With regard to authorities, it is enough to refer to Mr Bell, " who has collected the substance of them, as applicable both to " caution for the performance of an office, and for a cash-account " to a bank. He states, that in both the obligation transmits " against representatives, not merely for the debt as it stood at " the cautioner's death, but prospectively, as if they were the " original obligants.

" The case of the Commissioners of Excise *v.* Mitchell, is a " direct precedent. A person had farmed the excise duties, " and *quoad hoc* was an excise-officer. The heir of his cautioner " was found liable in what fell due after the cautioner's death. " The tack endured for six years, and a doubt was started *obiter* " on the Bench, whether the decision would have been the same " if the officer had been removeable at pleasure. Whether " that doubt was well founded or not, is of no consequence here, " for the judicial factor was not removeable at pleasure. His " office continued till the lunatic's death or reconvalescence, " and he could not be removed but for misconduct.

" Equally conclusive is the case of Erskine. The obligation

" is said to have been directed against the cautioner and his " heirs, though that is not expressly stated in the report. But " if it was so, the same circumstance occurs in this case, for " the cautioner binds himself, his heirs, executors, and suc- " cessors; and we have seen that an intromitter, by the law of " Scotland, represents the defunct as universally as either heir " or executor, and that the term successor is peculiarly appli- " cable to him.

" A third precedent is the case of the University of Glasgow " v. Sir William Miller, which is also in every material circum- " stance identical with the present, holding, as we have just " metioned, a vitious intromitter to be a successor and universal " representative.

" Farther citation is unnecessary. There is not one precedent " of a different aspect.

" The late Mr Greig, as a vitious intromitter, was in the same " predicament as Mr Bremner the younger, with this exception, " that he was of full age when his intromission commenced.

" Therefore, upon a review of the whole case, we are o- " opinion that both defenders are universally liable for the whol- " sum due by the late James Bremner at his death, with interes-

" It is for the House of Lords to judge whether this claim, " against Mr Bremner, was restricted expressly, or by implic- " tion, to the extent of the sums which he received. Wi- " regard to Mr Greig's trustees, there is no pretence for su- " restriction.

" C. HOPE.
" AD. GILLIES.
" J. H. MACKENZIE.
" JOHN FULLERTON.
" JAMES W. MONCREIF-
" F. JEFFREY.
" H. COCKBURN.
" JOHN CUNNINGHAME."

BREMNER *v.* CAMPBELL, &c. — 9th May, 1842.

The Judges of the Second Division, to whom the remit was made, in the absence of the Lord Justice Clerk, expressed their concurrence in this opinion, and, on the 5th March, 1839, pronounced the following interlocutor: — "Find the defender, Hugh "Bremner, and the defenders, Hamilton Pyper, the said Hugh "Bremner, and Alexander David Fraser, as the acting testa- "mentary trustees of the late Alexander Greig, and as such, "sisted in his room in this action, as defenders, liable, conjunctly "and severally, for the balance remaining due on the factorial "accounts of the deceased James Bremner, at the close of his "office of factor, and amounting to L.6055, 14s. sterling, as at "the 24th day of June, 1826, with the legal interest thereof from "said date till paid, under deduction always of such sums as the "said defenders, or either of them, may have already paid to "account thereof, or which the pursuer may have drawn or re- "ceived from the estate of the said James Bremner; Repel the "plea of septennial limitation, and whole other defences: Find "no expenses due, and decern: Declaring, that in pronouncing "this judgment, the Lords, in respect that the Minute, if any, "given in, is not before them, and they cannot, in the circum- "stances, assume an admission of restricted liability to have been "made, have been unable to take into consideration what is said "to have been stated at the Bar of the House of Lords. And "with respect to the other defenders, Grace Sanderson and "Thomas Sanderson, find it incompetent to pronounce any "judgment or decerniture, in respect they stand already assoil- "zied by an interlocutor long since final."

The appeal was by Hugh Bremner alone, and was against this interlocutor, and the interlocutors previous to the remit.

Lord Advocate and Follett for appellants. — I. It has never been alleged that the appellant was either served heir or con-

firmed executor to his father, Hugh Bremner. The only ground of liability, therefore, is vitious intromission with his father's estate, and the right to enforce his liability can be maintained only on the terms of H. Bremner's bond. That binds him, "his "heirs, executors, and successors," that is, those who represent him. Possibly it might, under an ordinary bond of caution, be maintained against an heir or executor, that the bond imposes a continuing obligation after the death of the cautioner, and imposes a liability on the heir or executor in respect of his representation of the deceased; but the bond here was judicial, requiring the approval of the Court as to the sufficiency of the cautioner, and therefore, in the case supposed, of the heir or executor, and, even in the case of an ordinary bond, the right of the creditor to insist on the liability, has always been rested on the terms of the bond, as actually binding heirs and executors, University of Glasgow *v.* Miller, *Mor.* 2104; Excise *v.* Mitchell, *Elchies*, *voce* Cautioner, No. 3; Erskine *v.* Erskine, *Mor.* 9002: But a vitious intromitter does not in any way represent the deceased; he merely subjects himself to a passive liability for the debts of the deceased, and that only for such debts as were actually due, *Ersk.* III. 9, 49; and the bond was not conceived in terms which could bind him at his death, or create against him an obligation continuing after the cautioner's death. On the ground of vitious intromission, therefore, there may be liability for H. Bremner's receipts up to his death, in 1804, but at that date all such liability ceased. A vitious intromitter is liable for the debts of the deceased, but not for the debts of his representatives.

II. Waving, for the present, the extent of the liability, the appellant is not a vitious intromitter; he never at any time intermeddled with the estate of his father; it was Greig alone who intermeddled, no doubt, holding at the time the character of tutor to the appellant, but without any authority from

appellant, direct or implied, to intermeddle in any way, either lawfully or unlawfully, at least, until the making of the deed on the marriage of Mrs Sanderson. Vitious intromission, however, is a powerful delict, whose consequences affect only the intromitter himself, *Ersk.* III. 9, 54. And so far as regards the fact of Greig having expended the money uplifted by him, in payments for behoof of the appellant, the appellant, so long as any of these payments could in strictness be said to have been made out of his father's estate, was in pupillarity, and incapable of binding himself by any act of his. By the time the appellant had reached puberty, Greig had more than exhausted his receipts; his payments thenceforth, on behalf of the appellant, were in truth out of his own proper funds, so that during the period of puberty, if in that period the appellant could have bound himself, there was no act of his bearing the character even of constructive intromission. As to the deed on Mr Sanderson's marriage, it was made not after the appellant's majority, as supposed by the consulted judges, but during his minority, and it does not, in its terms, either sanction past vitious intromission, or authorize its commission for the future; it only, by its terms, authorizes acts consistent with law, and, in the absence of any evidence to the contrary, this must be held to have been its intention, whatever use Greig may have made of it.

During his minority, the appellant could not be bound to inquire how Greig acquired the money which he expended on him, nor whether it had been obtained by proper legal title, nor even where it came from at all.

III. Assuming that the bond could continue the obligation after the death of the cautioner, and that the appellant is liable, in respect of his receipts from Greig, that liability cannot be as a vitious intromitter, but only in respect of his being *tantum lucratus*, and can attach only to such payments as were made to the appellant after he had attained majority. This limitation of

the liability was admitted by the respondent at the former hearing, and the terms of the remit did in truth direct the Court below to give effect to that admission. The respondent, therefore, was not entitled to enlarge his claim after the remit.

IV. If the appellant be not a vitious intromitter, and if his liability must be limited to the period after he reached majority, then there are no *media concludendi* in the summons, under which that liability can receive effect. The averments of the summons are, that the defendant is a vitious intromitter, and the conclusions are directed against him in that character, and are not confined to any particular period of the cautionary obligation, but cover the whole extent of its duration.

The appellant also maintained an argument, that the bond was cut off by the septennial limitation, and that the respondent's claim was barred by the neglect of those whom he represented to controul the acting of the factor, and several other grounds of defence, but those in the view which was taken by the House, did not form the subject of adjudication.

Tinney and Pemberton for the respondents. — I. The bond by H. Bremner was for the due performance of an office, not for any limited part of its endurance, but throughout until its termination; the liability immediately attached, although its extent was contingent upon the defaults of the factor, and as through the cautioner's interposition, the factor received power to intermeddle with the estate, so the cautioner's liability remained until that power ceased, or until the liability was put an end to by the court on a proper application to that effect. And after the death of the cautioner, the liability continues against his heir or executor, not as if it were his own personal obligation, but in respect of his representation of the deceased; Commissioners of Excise *v.* Mitchell, *ut supra*, where the heir of a cautioner for a tenant—

of excise was found liable for receipts after the death of the cautioner. And Erskine v. Erskine, *Mor.* 9002, where representatives were found liable for moneys received entirely after the death of the cautioner. So again in University of Glasgow v. Miller, *Mor.* 2106. The liability was not because of the bonds in these cases being in terms against heirs and executors, otherwise it would be absolute to the full amount of the deficiency, whereas it is according to the nature of the representation, *cum beneficio inventarii*, or otherwise.

But this liability of the representative, like that of the cautioner, might have been put an end to at any time. It was open to his representatives, as it was to H. Bremner, at any time to have determined the duration and extent of liability by an application to the Court to that effect, thereby giving an opportunity at the same time for the protection of the lunatic's estate, by the appointment of new cautioners. The bond did not therefore expire on H. Bremner's death in 1804, but continued effective until James Bremner's death in 1826.

II. The bond does not bind vitious intromitters *per expressum*, but it binds "successors" as well as heirs and executors, and is sufficient to attach a liability upon the cautioner's estate had it remained *in hereditate jacente*. The heir or executor is liable in respect of his representation, and in this respect the vitious intromitter is in the same predicament. He is not like the heir or executor liable under any direct personal obligation in the bond, but in respect of his possession, and intermeddling with the estate, he subjects himself to a liability which attached upon the cautioner's estate, into whose hands soever it might come, and in this respect he may be in a worse, but he can never be in a better situation than an heir or executor duly entered or confirmed.

III. Assuming that the appellant is protected from the passive title of vitious intromission, he must at all events be liable to the

extent of the moneys actually received by him, or paid on account; to this extent he has been *lucratus*, and must refun the estate of the lunatic. The acts of Greig, as his tutor, i him, Fraser *v.* Lovat, *Mor.* 16298; Drummond *v.* Menzies, 1 16320. He may no doubt be reponed against these acts on head of minority and lesion, but that must be within the lim period of four years after majority, *Ersk.* I. 7. 35, and can be done on the minor offering to restore to the extent of intromissions, Farquhar *v.* Campbell, *Mor.* 9023; Tailor Leith *v.* Dennistones, *Mor.* 9001; Barclay, *Mor.* 9031.

IV. It has in more than one case been held competent, w defenders to an action on the passive titles have been ab avoid the penal consequences of the action, to hold them u the same summons liable *in quantum lucratus*, Maxwell, 1 9971; Brown, *Mor.* 2734. The conclusions of the summon in no way departed from, or exceeeded by so doing. They more than sufficient to cover such a finding, and are in t only restricted to that extent.

LORD COTTENHAM. — My Lords, In this case the sum claimed against the representatives of a cautioner who die 1804, the amount due by the curator at the termination of office, in 1826. By the original interlocutor of 1832, the tioner's liability was held to have ceased at his own death. parties having appealed, this House, by the order of 1837, understand that order, left the question open.

All the Judges of the Court of Session have now held, that liability of the cautioner, notwithstanding his own death in 1 continued up to the termination of the office of the curator whom he was surety, in 1826, and of this I entertain no do The terms of the obligation are, I think, conclusive; but far the appellant, Hugh Bremner, the son of the cautione

liable to make good this liability of his father the cautioner, is a question of more difficulty. He was two years old when his father died, in 1804, therefore his age of pupillarity terminated in 1816, and his minority in February, 1823.

By the summons, the claim against the appellant was made "as executor decerned and confirmed to him, or as vitious "intromitter with his means and estates, or as otherwise repre- "senting him on one or other of the passive titles known in law, "to implement the obligation," &c.

The defender, the appellant, denied that he was heir or executor, or that he had represented his father on any passive title, or that he had intromitted with his estate; but he admitted that Mr Greig had, and that he had himself received certain sums of money from Mr Greig. But in the joint statement of facts for the defendant, Hugh Bremner, and Mr Greig, it is alleged that he, the defendant, Hugh Bremner, had resided with Mr Greig (who was his uncle) since 1805, with the exception of six months, during which he went to Malta, and that Mr Greig had defrayed the whole expenses of his board, maintenance, and education for that period, his expenses to and from Malta, and also the expenses of his apprenticeship and admission into the society of Writers to the Signet, besides making him sundry other advances. And in order to shew that Mr Greig had paid more than he had received from the estate of the appellant's father, a statement of his receipts and payments is set out, in which, under the head of payment to and for the children, "board, clothing, education," &c. there are two items, Mr Hugh Bremner, L.1511, 19s. 4d. and L.1440.

I have not been able to find any other evidence against the appellant, Hugh Bremner, touching his intromissions with the estate of his father; but if the abstract of account printed in the appendix to the respondent's case, No. 2, which appears to have been produced by Mr Greig, were receivable as against the

appellant, it would only shew, that of the L.1511, all but L.84(were payments by Mr Greig on account of the appellant befo he attained twenty-one, and L.840 since that time; and that th L.1440, were charges or payments for his board, clothing, edu cation, and other necessary expenses from 1805 to 1829.

When the case first came before the Court of Session, in 183 the doubt appears to have been as to the extent of the obligatio for none of the learned Judges considered that the appella could be liable for the whole demand as a vitious intromitte Lord Cringletie, indeed, is made to say that he thought th appellant liable, in so far as he had received part of the mone But the Lord Justice Clerk asked how the obligation could b enforced against infant children. And Lord Glenlee said, th a child could never be made to pay all his ancestor's debts on t ground of vitious intromission. And in one report, 14 *S.* & 182, Lord Glenlee is made to say, that although the son can be liable as a vitious intromitter, he must be liable for what h got from the estate of the deceased.

When the case came before the Court again in 1835, Lord Meadowbank and Medwyn expressed similar opinions. Th Court were of opinion that the liability was restricted to th period of the death of the cautioner, in 1804, but they held th appellant bound to pay L.1038, the balance then due, with int rest: upon what ground, consistently with the opinions expressed, and upon the evidence before the Court, does n appear.

When the case came before this House in 1837, both t learned counsel for the respondent, the pursuer, limited th demand against the appellant to what he had received of h father's estate after he had attained twenty-one; and the respo dent having been required to hand in a sketch of the judgme he prayed, submitted in writing, that the judgment of the Hou of Lords should be "as against Hugh Bremner for whatev

"sum he shall be ascertained to have received from the estate "of his father, the cautioner, after he attained the years of "majority."

This statement of claim was accordingly incorporated in the order of this House of the 14th of July, 1837, the remit being on the question of the septennial prescription, and on the question of the several liabilities of Hugh Bremner and others, "both in "respect of, and assuming the liability of, the late Hugh Brem- "ner to be as found by the said interlocutor of the 6th July, "1832, and in any other respect, regard being had to the state- "ment of the respondent's counsel at the bar of this House, that "Hugh Bremner the younger was liable for the moneys received "by him after attaining twenty-one years of age, from the estate "and effects of Hugh Bremner the elder."

The respondent, the pursuer, accordingly, in the paper prepared for the Court of Session upon the remit, confined his claim as against the appellant to what he had so received, for after shortly alluding to the general title of claim, he says,— "The pursuer, however, shall at preseut assume, that the defen- "dant is so far protected against such passive title; and that his "liability cannot be extended beyond the funds which he has "actually received, or which have been expended on his behalf;" and he concludes, by submitting, that judgment ought to be pronounced "against the defendants, the trustees of Mr Greig, "for the full balance due on the factorial accounts, and against "Bremner, conjointly and severally with them, if not to the "same extent, at least, in so far as he had derived benefit from "his deceased father's estate, but alternatively, and at all events, "against both defendants, conjointly and severally, for the balance "due on the factorial accounts at the date of the cautioner's death "in 1804, and, in either case, with interest and expenses."

This claim was certainly a departure from the claim made at the bar of this house, and of the judgment then asked, and con-

tained manifest inconsistencies, but it was not a distinct abandonment of the claim as against the appellant, of unlimited liability as a vitious intromitter.

The object of the order of this house, is, I think, sufficiently explicit. The house required the opinion of the judges, as to the extent of the liability under the bond, whether the obligation upon the cautioner was determined by his own death, or whether it extended to the transactions of the party for whom he was surety for the subsequent period. But whatever might be the result of that question, the house considered the liability of the defendant, the appellant, as restricted to repayment of such sums as he had received from his father's estate, after he had attained twenty-one.

I think this the necessary result of what has taken place in the proceedings in this suit, and I think it equally clear, that the defendant has not made any available defence against this restricted liability.

The holding that the obligation extended to the period beyond the death of the cautioner, necessarily excludes the defence from the septennial prescription, and from the delay.

And as to the objection, that the summons is not such as to entitle the pursuer to compel him to restore what he has received of the estate since he had attained twenty-one, I am of opinion, that it cannot be maintained. The summons seeks to make the defendant responsible to all the creditors upon the ground of his having so intromitted with the estate as to incur a passive responsibility. A decree holding the defendant liable to the creditors for what he has received, is not inconsistent with the case sought to be established by the summons. It is, indeed, a much more restricted liability, but his intromission with the property is the foundation of both. Under certain circumstances, such intromission subjects the intruder to a general liability, but under other circumstances, only to a responsibility to refund so much

of the estate as he has received. A plaintiff is never bound to state the *minimum* of what he is to be found entitled to; but under a larger claim may recover any smaller relief which is consistent with, and grows out of the facts stated. Such is the general principle, and the cases referred to, appear to me to shew that the courts in Scotland have properly applied that principle to such cases as the present.

That the appellant received certain sums of money after he had attained twenty-one, from Mr Greig, on account of his supposed interest in his father's estate, is admitted, and he cannot be heard to say, that these sums were not part of his father's estate, because Mr Greig had at that time paid more in debts, and to the family of the appellant's father, than what he had received from the estate. Had Mr Greig been a proper executor, he could not have protected himself against creditors, by proving that he had exhausted the estate in payments to the family. I do not, however, find any sufficient proof as against the appellant of the amount of what he so received, after he had attained twenty-one.

Unless, therefore, the parties can, to avoid farther litigation, agree upon the amount, I think that the course for this house to adopt, will be to reverse the interlocutor appealed from, and to declare that the defendant is liable to repay with interest the amount of all sums received by him, from or on account of his father's estate since he attained twenty-one, and to remit it to the Court of Session to ascertain what sums were so received, and to calculate interest thereon, and to make such order therein as shall be necessary to carry this declaration into effect, but without expenses. This is not a case in which costs can be given, here, or in the Court below.

It is not necessary, for the purpose of the order which, I think, this house ought to make, that any decided opinion should be expressed, as to the grounds upon which the judges of the Court of Session formed their judgment upon the subject remitted to their

consideration by the order of 1837. This judgment is entitled to the highest consideration. It is the unanimous opinion of eleven of the Scotch judges, three of whom, Lords Meadowbank, Medwyn, and Glenlee, had in 1832 and 1835, together with the Lord Justice Clerk, and Lord Cringletie, according to the report, expressed directly opposite opinions upon the subject of vitious intromission by the appellant, which certainly gives additional weight to the conclusion to which they ultimately came. I am, however, anxious to guard myself against the supposition that I am, in the present state of information, prepared to concur in the reasoning upon this part of the case, referring such reasoning to the facts proved in the cause. All the judges concur in stating, that no pupil can be a vitious intromitter, but they seem to think, that what took place between the appellant's attaining the age of fourteen and twenty-one, did subject him to the consequences of vitious intromission, because he did not during his minority or the *quadriennium utile*, obtain relief by *restitutio in integrum*. What was proved in the cause amounted at the most to this, that the appellant during his minority had been maintained and educated by his uncle Mr Greig, who had been appointed his tutor and curator by his father, and who had, without authority, intromitted with the father's estate. Such, at least, was the whole of the case in evidence up to the date of the 6th August, 1818.

The appellant had attained the age of sixteen in the preceding month of February, and appears to have executed the deed on the marriage of Mr Sanderson. If it were necessary to consider, whether the being a party to this deed, at the age of sixteen, subjected the appellant to the consequences of a vitious intromission, the first consideration would be, whether it authorized any future illegal act by Alexander Greig; and whether, if he had duly performed the duty undertaken by this deed, he ought not to have procured legal authority for realizing the property; for, if such be the true construction and real object of this deed, it

is difficult to comprehend how any liability could arise from the appellant having been a party to it. Another subject for consideration would be, how far the acts of Alexander Greig, during the minority of the appellant, or this deed itself, was a matter from which it was incumbent upon the appellant to apply to be relieved by *a restitutio in integrum.*

It appears, however, that the opinion of the Judges was principally founded on the assumed fact, that the intromission had been continued by the appellant himself, for several years after he had attained majority. Had it been necessary to come to any conclusion upon this part of the case, the first consideration would have been, whether the facts upon which this opinion was founded were proved in the cause; whether Mr Greig's accounts, if proved, could be used as evidence against the appellant; and whether they established any intromission against the appellant; or whether the true result of the statement of such accounts was not, that Alexander Greig had alone intromitted with the estate of the father, and that all that the appellant had received had been by allowances, payments, or advances, by his uncle, Mr Greig; and, in that case, the question ultimately to be decided would have been, whether the taking the benefit of such allowances, payments, and advances, would subject the appellant to the penal consequences of a vitious intromission.

I hope I shall be understood as not expressing any decided opinion upon any of these points, contrary to the opinions of the Judges of the Court of Session, but as intending only to guard against the supposition, that the order I propose to this House to make, affirms or negatives any conclusion upon any of these points, and to suggest, that when they shall arise for judgment they will deserve and require the most grave consideration.

Lord Brougham. — My Lords, I entirely concur with my noble and learned friend in this case, nor should I have troubled your Lordships with one word upon the subject, as I had not an

opportunity of hearing the arguments; but, for the reference it was necessary I should make to the remit made five years ago, when this cause was before me, and when I moved your Lordships, to which you assented, to remit the case, with instructions, to Scotland, I having then occasion, of course, to direct my attention to that remit, and to the manner in which it should be conducted in the Court below, and I think, certainly some little misapprehension appears to have existed, with respect at least to part of the terms of the remit; I allude particularly to the part which says, "regard being had to the statement of the respon- "dent's counsel at the bar of this House, that Hugh Bremner "the younger is liable for the moneys received by him." When the case was before your Lordships, in the year 1837, I took exactly the same view of the case as my noble and learned friend, and if he does not move, I will move your Lordships' judgment.

Lord Cottenham. — I will therefore move your Lordships, that the interlocutor appealed from be reversed, and another interlocutor substituted in its place, by which it shall be declared, that the defendant is liable to repay, with interest, the amount of all sums received by him, from or on account of his father's estate, since he attained twenty-one, and to remit it to the Court of Session to ascertain what sums were so received, and to calculate interest thereon, and make such order therein as shall be necessary to carry this order into effect, without expenses.

Lord Brougham. — It is highly expedient that the parties should come to an arrangement among themselves, as my noble and learned friend suggests.

Lord Cottenham. — If the parties come to any arrangement as to the sum, it will save the expense consequent upon the House ordering it back; otherwise, I should propose that that be your Lordships' order.

Mr Deans. — My Lord, with regard to the expenses of the appellant, supposing it should turn out, upon investigation in

the Court of Session, that no sum has been paid to the appellant since twenty-one, is it clear that the Court are at liberty to find him entitled to expenses?

Lord Cottenham. — No. I consider, under all the circumstances, and the nature of the claim made, he cannot be entitled to expenses. It is very desirable that the parties should agree upon the sum, there can be no difficulty about it; and if they can, it will be put into the order.

It is Ordered and Adjudged, that the interlocutors complained of in the said appeal be, and the same are hereby reversed in so far as they declare any liability in the defender, the said Hugh Bremner: And it is declared that the defender, (appellant,) the said Hugh Bremner, is liable to repay with interest the amount of all sums received by him from or on account of his father's estate since he attained the age of twenty-one years: And it is farther ordered, that with this declaration the cause be remitted back to the Court of Session in Scotland; and that the said Court be directed to ascertain what sums were so received, and to calculate interest thereupon, and to make such order therein as shall be necessary to carry this declaration into effect.

DEANS & DUNLOP. — RICHARDSON & CONNELL, Agents.

[27th May, 1842.]

The EDINBURGH and GLASGOW UNION CANAL COMPANY, *Appellants.*

SIR THOMAS GIBSON CARMICHAEL, *Respondent.*

Sale. — Terms of contract *held* not to import a sale of stone under land, but merely an agreement for compensation, in respect of a use of the land, whereby the working of the stone was rendered impracticable.

Interest. — Where possession of land was given for the purpose of forming a canal, under an agreement to pay compensation for the value of stone supposed to be under the land, so soon as the existence of the stone should be disclosed, *held* that interest was not due from the time of obtaining possession, but from the time at which the existence of the stone and its quality was ascertained.

Process. — It is not competent, after the record is closed, to ask by supplementary summons, for interest on the sums concluded for in the original libel.

Process. — *Reclaiming note.* — A defence to the competency of a supplementary action *held* to be sufficiently embraced by the prayer of a reclaiming note, so as to have effect given to it, notwithstanding the conjunction of the supplemental with the original action.

THE appellants being about to carry the line of their canal through the grounds of the respondent, he objected that a stratum of freestone worked by him in an adjoining quarry, extended under the proposed line, and insisted, under an agreement entered into, previous to the passing of the statute, authorizing the formation of the canal, that the line should be made so to diverge as to avoid the stratum. This difference was adjusted by a mutual agreement, bearing date 28th February and 3d March

1818, whereby the respondent agreed, among other things, that the canal should be executed according to the Parliamentary line, "provided always, that in case a face of rock shall be afterwards "found and wrought up to the canal, that the said Canal Com- "pany shall be obliged to turn the canal over the rubbish of said "quarry, leaving a proper access by aqueduct, for a road and "water level from the workings, or in the option of the said Sir "Thomas Gibson Carmichael, shall construct an aqueduct, so "as to allow the rock being wrought to the southward of it, if "it really exist, and shall pay the lordship of whatever stone the "canal shall cover, so soon as the adjoining workings prove that "it really does cover such rock, and impedes the operations of the "quarry." And the company, on the other hand, agreed to pay the damage occasioned by the making of the canal, in terms of the statute. "And the said Company are farther hereby bound "and obliged, in case at any time after the said line shall be ex- "ecuted, a face of rock shall be found and wrought up to the "canal, to turn, at the expense of the said Company, the canal "over the rubbish of such quarry, leaving a proper access by "aqueduct for a road and water level from the workings; or, in "the option of the said Sir Thomas Gibson Carmichael, and his "foresaids, to construct such an aqueduct as will allow of the "rock being wrought to the southward, and to pay to him and his "foresaids the lordship or worth to him for the time, of whatever "stone the canal may cover, to be ascertained by reference to "proper judges at the time, as soon as the adjoining workings "prove that it really does cover such rock, and impedes the "operations of the quarry; and the said Company are hereby "bound and obliged to guarantee the said Sir Thomas Gibson "Carmichael, and his foresaids, against all risk of water escaping "from the canal in its course from Kingsknows farm-steading "along by the pits made and marked on the said plan Nos. 1, "2, 3, and 4, by sufficient puddling, and by a water tract along

" the north side of the canal, below the level of the water therei
" and otherwise, and to carry the present run of water belo
" near the road side off in a westerly direction, and thereby re
" lieve the present quarry workings of that water, which in it
" present easterly course finds its way into the quarry; all whic
" operations shall be done to the satisfaction of one or two neu
" tral engineers, mutually chosen by the parties."

On 3d December, 1825, the respondent having worked ou the stratum on the north side of the canal, intimated to the appe lants, " that in exercise of the option left to him by the agree " ment, he declared his choice to be that the canal should re " main in its present situation."

The parties again differed as to their rights, and in consequenc a submission was entered into between them to Lord Newtor Under that reference the respondent claimed a lordship o 11s. per ton on the ordinary marketable price of the ston covered by the canal; the construction of an aqueduct and tun nel under the canal; of a mine to carry off the water from th new workings to be commenced on the south side of the canal; an of a bridge over the canal for the convenience of the quarries o either side. The arbiter remitted to Mr Jardine, an engineer, t report to him as to the necessity for a tunnel. The engine reported on 22d January, 1830, and in consequence the arbit ordered the different works required to be constructed, and th was done in the course of the reference. During this period, th respondent opened the quarry on the south side of the canal, an to an extent disputed by the parties, discovered the existence o stone on that side. Before the reference was concluded, Lor Newton died, and it thereby terminated.

In November, 1833, the respondent brought an action again the appellants, in which he set forth, that the workings on th south side had discovered stone to be under the canal betwee two fixed points on a plan marked A and C; and concluded, tha

the appellants should be ordained "to make payment to the pursuer "of the sum of L.20,000 sterling, or of such other sum, less or "more, as shall be ascertained to be the amount of the lordship "and worth to him for the time, of such part of the said rock "covered by the canal as extends along the whole length of the "workings of the pursuer's quarry, on the north bank of the "said canal, to the extent in length comprehended between the "said points A and C, laid down and defined in the said fore-"said plan; or at least, of the sum of L.10,000, or such other "sum, less or more, as shall, in like manner, be ascertained to "be the amount of the lordship or worth to the pursuer for the "time, of such part of the said rock covered and extending as "aforesaid, as the adjoining workings to the south of the canal "have already proved to exist, in terms of the said agreement; "reserving always to the pursuer his claim and right afterwards "to prosecute and follow forth all actions and proceedings for "the lordship or value of the remainder of the rock covered by "the said canal, in terms and in virtue of the said obligation "undertaken by the said Company, and also reserving all other "claims and demands competent to the pursuer, under and by "virtue of the agreement before narrated."

After defences had been put in, condescendence and answers were ordered, and to their answers the appellants subjoined the following pleas in law: —

"1. As neither the quantity of stone or rock covered by the "canal, nor the price at which it would sell, if quarried and ex-"posed to sale, have been specified by the pursuer, there are no "grounds upon which either of the demands made by him in his "summons can be sustained.

"2. The defenders having been always willing and ready, as "soon as the extent of rock or stone covered by the canal should "be ascertained, to fulfil their part of the contract or agreement

" as to the payment of the lordship or per centage, the pre
" action is altogether unnecessary.

" 3. As the payment of any lordship or per centage upon
" selling price of the stones necessarily implies the right of q
" rying and selling such part of these stones as the defen
" may find convenient, the pursuer, even if he could condes
" upon the amount of his claim, would be bound, before dec
" ding payment of his lordship or per centage, to give pr
" and sufficient security, that the defenders, when they fir
" convenient to remove the rock or stone, for which they ar
" pay the lordship or per centage, should not be interrupte
" doing so by future heirs of entail, or other third parties.

" 4. Generally, the pursuer is not entitled to decree, in t
" of his libel."

Before the record was closed, the parties consented to a r
to Wood, an engineer, to report " upon the questions of fa
" the case." Under that remit Wood, in 1838, reported, -

" 1. That the rock on the north side of the canal, from
" point marked C on the plan herewith produced, and signe
" the reporter as relative hereto, westward to the point ma
" B on said plan, was exposed by the workings of the quarr
" *the 16th day of November*, 1825.

" 2. That a tunnel was made through the rock left under
" canal, from the rock on the north side to that on the s
" side thereof, and a shaft was sunk down from the surfa
" this tunnel, and consequently a portion of the rock, equ
" dimensions to the size of the tunnel and shaft, was expose
" the south side of the canal, on the 13th day of August, 1

" 3. That the whole rock on the south side of the canal, l
" between the two points marked A and D upon the for
" plan, was exposed by the workings on the south side of
" canal, on the 31st day of December, 1836.

"4. That the value of the rock left underneath the canal from "the line marked C D to the line marked A B on the foresaid "plan, where the fall of the said rock has been exposed on both "sides of the canal, after making allowance for the extent of rock "excavated by the tunnel, is L.3930, 4s. 6d. sterling."

The meaning of his report Wood explained, in a letter to the parties, which he appended to his report, to be as follows:—"The "question is not simply as to the time when the sum brought "out by me is payable, whether on the 16th November, 1825, "or any other bygone period; the question is as to the mode of "assessing the value of the rock under the canal, according to "the terms of the agreement, — as to whether Sir T. Carmichael "is to be paid the value of the rock left under the canal at the "sale prices of the quarry, due on some day prescribed by the "agreement, and to be determined by the Court; or whether "he is to be paid such a sum as would be equivalent to the "value of the rock to him, or the mercantile value, on such day. "In the former case, the sum brought out by me would be the "sum payable to Sir T. Carmichael on the day which the Court "shall decide that sum to be due or payable, and it will be for "the Court to decide whether any or what interest is payable, — "no interest being considered by me in the sum named. In the "latter case, viz., if the Court should determine that the mer-"cantile value should be paid to Sir T. Carmichael, the said "sum will not apply at all; it will, I presume, involve a very "different mode of calculation, as it will comprehend the ques-"tion of what value the rock under the canal was to Sir T. "Carmichael, considered in connection with the interruption "interposed, and loss occasioned to the workings and sales of "the quarry by the rock under the canal, there being other rock "to work. The two cases would only be the same if, when the "workings reached the rock left under the canal, there was no "other rock to work, then the sum brought out by me would

" apply to both cases; but there being other rock to work, if
" mercantile value to Sir T. Carmichael is to be the sum paid
" different mode of estimate of the value will, it appears to
" have to be made, — the value by me not applying at all
" such a case."

Objections were taken by the appellants to this report, in wh they insisted, " that the mercantile value of the worth, for " time, to the pursuer, of the rock covered by the canal," ou to be ascertained.

On advising these papers, and hearing counsel, the L Ordinary, (Jeffrey,) on the 22d February, 1839, pronounced following interlocutor, adding the subjoined note: — " The L " Ordinary having heard the counsel for the parties on the " *terim* report, or award of the judicial referee, and made a " zandum, — approves of the said report or award, in so far " it fixes and ascertains the value of the rock or stone under, " so nearly adjoining that part of the canal referred to in " said report, as to be incapable of being wrought or quarr " with safety to the said canal; — Finds that, according to " just and true purport and meaning of the agreement of F " ruary and March, 1818, the Canal Company is bound to " to the pursuer the ascertained value of the said rock or sto " as if they had been purchasers thereof, at and from the peri " when its existence and position was ascertained by the " posure of its face (or vertical surface) in the course of " pursuer's workings in his adjoining quarries; but that they " not bound to pay the whole of the said ascertained value in o " sum, and as if the entire mass of the said rock had been act " ally worked out and removed on the day when they are th " held to have become purchasers of the same, but only at su " periods, and by such instalments, as the pursuer might ha " realized by working out the said rock for the market, accor " ing to the ordinary rate and course of sales from his s

" quarries at the time, and on the supposition that the whole of " the said sales had been supplied from the rock so appropriated " by the said Canal Company. And before farther answer, " appoints the cause to be enrolled, that parties may explain in " what terms decree should now issue in conformity with the " preceding findings, or what other proceedings are yet to be " had in the cause."

" *Note.* — The defenders seemed at one time disposed to maintain, " that nothing more should be awarded to the pursuer, as ' the lord- " 'ship or worth to him' of the rock in question, than the actual " damage or loss he might suffer, either by not having enough of " other stone left to supply the demand, or by being put to extraor- " dinary expense in working such other stone; and that while he had " abundance of other stone easily accessible, he had no claim at all. " But the Lord Ordinary has no doubt that this view is untenable, " and that the defenders are to be dealt with as purchasers, and, in " fact, would have been liable as such, even if they had not entered " into the specific agreement libelled on. They necessarily " became purchasers of the *solum* required for their canal and its " banks, towing paths, &c., and consequently of the minerals under " that ground, — for the full value of which they were consequently " bound to indemnify the owners, as parties whom they on the one " hand had compelled to sell, and who were entitled on the other to " take the full benefit of the need these adventurers for gain " happened to have for their property. The words of the agreement, " accordingly, fully express this meaning, and indeed are capable of " no other interpretation. The Canal Company required this un- " wrought stone just as indispensably for the casement and support " of their canal, as if they had required to work out and pay for an " equal quantity to face up their banks, basins, or locks, in the " vicinity, and were no more entitled to deprive the owners of the " one article than of the other, without paying its full value. It might " be a piece of good fortune for the owner of the stone, that so good " a customer was thus obliged to deal with him, but it was a piece of

" good fortune of which he was fairly entitled to take advantage; " and as the canal adventurers could scarcely do without his com- " modity, they have reason perhaps to be thankful that he only " stipulated to be paid at the ordinary market price. The Lord " Ordinary has no doubt, therefore, that 'the lordship or worth to " 'him' of the stone in question, must be taken, (in the plain sense " of the words,) to mean the value or price which it would have " brought at the time, if sold for the more ordinary purpose of being " wrought out and employed in buildings. But, on the other hand, " as that price would not have been realized at once if drawn in from " such ordinary workings, it seems reasonable to limit the liability of " the defenders to what they would have had to pay if they had re- " moved the whole stone, at the quickest rate of working actually " practised in the adjoining quarries."

The appellants reclaimed against this interlocutor, but the Court adhered to it by an interlocutor dated 15th November, 1839. Subsequently, the parties agreed to close the record, and that was accordingly done by an interlocutor on the 23d November, 1839.

Parties were then heard before the Lord Ordinary on the reserved points of the cause, when the respondent urged a claim for interest on the money that might be found due to him. This was objected to by the appellants on several grounds, and among the rest, that the conclusions of the respondent's summons would not warrant a decree for interest.

On the 28th November, 1839, the Lord Ordinary pronounced the following interlocutor:—" Having heard parties' procura- " tors upon the remaining points of the cause, and especially on " the motion of the pursuer for an interim decree for the sum of " L.3930, 4s. 6d., before farther answer, appoints the defenders " within twenty-one days from this date, to consign in the bank " of the British Linen Company, the said sum of L.3930, 4s. 6d. " to general account of the pursuer's claims, — reserving all

"*inde* all questions as to the defenders' liability in interest, "whether past or future, upon the sum so consigned, subject to "the future orders of the Court or Lord Ordinary in this cause; "and farther appoints the said parties to give in mutual minutes "of debate, — 1st, On the claim of interest generally on the part "of the pursuer; — and 2d, On the defenders' objection to the "sufficiency of the pursuer's title to grant them a valid discharge "or secure right to the stone mentioned in the agreement."

The respondent gave in the minute ordered by this interlocutor, and claimed interest on L.3930, 4s. 6d. from 16th November, 1825; and to obviate the objection to the conclusions of his summons, in case it should be sustained, he, in January, 1840, brought a supplementary action by a summons, which set forth the proceedings in the original action, including the interlocutor ordering the minutes of debate, and proceeded in these terms:— "That, accordingly, minutes of debate have been prepared "and lodged, in which the pursuer's right to interest generally "is, *inter alia*, argued; but the pursuer is advised, that though "he succeeds in his claim of interest, he will still have to combat "the technical objection raised by the defenders on the wording "of the conclusions of the original summons, and that the objec- "tion is capable of being removed by a supplementary summons, "in which an express conclusion for interest may be inserted: "Therefore this present supplementary summons, and the action "to follow hereon, ought and should be remitted to, and con- "joined with the foresaid original action at the instance of the "pursuer: And the said Edinburgh and Glasgow Union Canal "Company ought and should be decerned and ordained, by de- "cree of the Lords of our Council and Session, to make pay- "ment to the pursuer of the due and lawful interest of the said "principal sum of L.3930, 4s. 6d., which has been found by the "Court to be due to the pursuer as the amount of the lordship "or worth to him for the time of the foresaid portion of rock

" reported on by Mr Wood; and also of the due and h
" terest of whatever other or farther sum or sums may y
" course of the said original action, or of the said origin
" and this supplementary action when conjoined, be foun
" Court to be due to the pursuer, as the amount of the
" or worth to him for the time of the remaining portion
" rock belonging to the pursuer covered by the canal, e
" by the conclusions of the said original summons; such
" to begin to run from and after the 16th of November
" from and after such date or dates as our said Lords
" and determine, and to continue so to run until payn
" serving always to the pursuer his claim and right a
" to prosecute and follow forth all actions and procee
" the lordship, or value of the remainder of the rock co
" the said canal, in terms and in virtue of the said o
" undertaken by the said Company; and also reserving
" objections and demands competent to the pursuer u
" by virtue of the agreement before narrated."

This supplementary action did not do any thing to ob
objection as to want of parties.

On the 25th February, 1840, the Lord Ordinary rep
original cause to the Court upon the minutes of debat
the same time, he issued a note which, as to the questi
terest, was in these terms: —

" *Note.* — The Lord Ordinary's present impression is in
" the pursuer, on both the points discussed in these minut
" as both appear to him to depend very much on what may b
" to be the true import and effect of the final interlocutor
" pronounced in the cause, he has thought it best to repor
" out a judgment, that the Court may at once determin
" necessary, explain on what grounds they adopted these
" tors, and in what sense they meant that they should be e
" For his own part, the Lord Ordinary has no hesitation

"that by finding that the defenders 'must pay the ascertained value 'of the rock or stone in question, as if they had been purchasers 'thereof,' at a certain date; he certainly meant neither more nor less than that they did become purchasers as at that date; and purchasers too, who must be considered as having received delivery, and taken full possession of the subject, at or before that time. Till the pursuer declared his election to let them rest their canal permanently on the rock or stone, which he might otherwise have quarried, and to accept from them the price of that stone in return, there were, to be sure, no grounds for holding that there was any sale or purchase of that stone; because, if he had chosen the other alternative, the canal must then have been shifted to another place, and the whole stone left at his disposal, as freely as if no canal had ever come into the neighbourhood. But from the moment when he made his election to take the price of the stone, and make it finally over to the defenders, to be used either as the permanent basement of their canal, or for any other purpose they might prefer, it is thought to be clear that the agreement which, up to that time, was contingent or ambiguous, passed finally, and resolved itself into an ordinary purchase and sale, under which the commodity became the property of the buyer, and the price became due to the seller. In these circumstances, the Lord Ordinary, in using the words referred to in his interlocutor, meant certainly, not that the transaction with the defenders was analogous to a sale, or that, though not really purchasers, they should be dealt with as if they were, but simply that though the nature of their contract was for some time in suspense, and it was uncertain what character it might ultimately assume, it necessarily passed at once into a completed sale, as soon as the existence of the subject had been ascertained, and the option declared by the owner to take the market price for it; and to leave it, for that price, with the defenders.

"But if it was clearly a sale from that period, it is thought to be at least equally clear, that it was a sale then consummated or completed by delivery; and consequently a sale under which the price became instantly exigible. The seller not only then renounced and made over all right he had to the possession of the subject, and

" the buyers acquired all that right, but they thenceforward h
" the precise title of that contract, all the possession and occu
" which he could give as proprietor; and, in fact, the only
" occupancy, for the sake of which they had agreed to pay t
" marketable value of the subject. From that moment they h
" doubtedly a complete right to exclude him, and all his repr
" tives from any use of it, in all time to come. The pursuer co
" indeed — the Lord Ordinary thinks most rashly and unadvise
" that they only acquired right to use it as the basement o
" canal. He will probably find that plea, which he has no intel
" interest even to maintain, most injurious, if not fatal, to his
" ment on the second point discussed in the minutes. But it
" perhaps very material to that now under consideration; s
" would still be true that the bargain, whatever it was, wa
" completed by full delivery and possession of all that was stip
" for or required, as the counterpart of the price or consider
" and if the price is payable now, (which is not disputed), i
" have been equally payable in 1825, the time at which the c
" was irrevocably fixed by the pursuer's election, and ever
" which, the defenders have held possession, on the same titl
" security on which they hold it at this day.

" The only difficulty the Lord Ordinary had, was in fixi
" precise date when this payment should be held to have bee
" Upon principle, he thinks it might have been carried back
" day when the pursuer declared his election, that the settl
" (possession being already taken) should be by payment of a
" But as it was not then absolutely certain that there was any s
" in existence (that is, any stone actually under or close
" canal,) to which the contract could apply, it was thought bet
" take the time when it was ascertained that there was such
" ject by its being laid bare in the course of the workings
" north, and the consequent stoppage of those workings if the
" was to remain where it was; and as the interval between the
" periods was but of a few months, there was the less diffic
" taking the last of them as the criterion. The Lord Ordinary
" ever, thinks it plain, that there is no ground for holding th

" contract should not be held completed, till the stone was laid bare " on both sides of the canal. That might be necessary to ascertain " the *quantum* which was to be paid for the loss or renunciation of " it, but not at all for the final completion of the contract, to pay " whatever might turn out to have been then made over; or for " settling the point that the canal was to continue over the stone in " consideration of a price to be paid; which price, it is thought, " must be due from the moment the workings were stopped, for " which it was to be an indemnification, and the site of the canal " secured, which was the final confirmation of the possession.

" But if this be the just view of the transaction, as settled by the " true meaning of the former interlocutors, it is thought to admit of " little doubt, that interest must be found due from the period when " the contract was thus completed, and consummated by delivery. " The right may not arise *ex mora*, or from any precise contract, but " rests on that plain and palpable equity, which has authorized or " rather necessitated the supposition, — or fiction it may be, — of a " *quasi* contract, or implied contract, to this effect: on that obvious " rule, in short, of common justice, which will not allow a man to " hold and profit by a property which he has taken as a purchaser " from another, without paying the annual or termly interest of the " stipulated price, as a *surrogatum*, or compensation, for the annual " or termly use or profit he has had of the property, while the price " was, however unavoidably, withheld. On this ground, accordingly, " it is settled that the purchaser of a land estate, who enters into " possession, must ultimately pay the interest on the price from the " time of such possession, though the actual payment may have been " necessarily delayed, either from the want of a sufficient title, or the " difficulty of liquidating its just amount, by actual valuations, or the " decree of some appointed referee. There is, and there can be, " nothing in such considerations to defeat the plain principle, that a " purchaser cannot have both the use and profit of the thing pur- " chased, and of the price due for it, for one and the same period; " and that he must therefore pay interest on the price, for all the " period that he has actually had the enjoyment of the thing pur- " chased. Nor is the application of this principle to the present

" case, in the Lord Ordinary's view of it, in any degree d
" He has already said, that the defenders got full right to th
" in question in 1825; and, undoubtedly, they have ever since
" the possession of it which they contemplated, when they ag
" pay its full value to the pursuer. The Lord Ordinary
" reason to doubt that they might then have worked out the
" of it for sale, if they had chosen to expose their canal to th
" of such an operation; and, in their present minute, they the
" assume and maintain, that they had undoubtedly such a rig
" they did not work it out accordingly, it could only be becau
" thought they had more profit and advantage from it in
" way; that they benefit, not less but more, by their keepi
" using the subject of their purchase themselves, than if th
" sold it again to other parties. But, if this be plain and und
" it is equally undeniable that they have ever since had all th
" session and enjoyment of their purchase, which imposes c
" the necessity of accounting for the interest or natural proc
" the price, for the profits of which also they could not possib
" any maintainable claim."

On the 21st May, 1840, the Court pronounced the fo
interlocutor: — " The Lords having, on the report o
" Jeffrey, Ordinary, considered the mutual revised min
" debate for the parties, and whole process, and having
" parties' procurators, — Find that the defenders are bc
" pay to the pursuer, personally and individually, the inte
" the sum of L.3930, 4s. 6d., which, in terms of Mr
" interim report, is the ascertained value of the rock o
" already reported on by him, and that from and afi
" period when the existence and position of the said r
" stone was ascertained by the exposure of its face (or
" surface) in the course of the pursuer's workings in his
" ing quarries, which period is fixed by the said report t
" been the 16th November, 1825; but this always und

"subject to the qualification as to paying the said sum of "L.3930, 4s. 6d. by instalments, contained in the interlocutor "of 22d February, 1839, since adhered to by the Court; and "before answer as to the question of the pursuer's right to up-"lift and receive payment personally and individually of the "capital of the said sum of L.3930, 4s. 6d. itself, appoint the "heirs of tailzie of the entailed estate of Hailes to be called into "the field by a declarator, or otherwise, by one or both of the "parties to this process, so as to afford them an opportunity of "appearing for their interest, and supersede farther considera-"tion of the said question till that be done. *Quoad ultra*, re-"mit to the Lord Ordinary to do farther in the cause as to him "shall seem just, and particularly to fix the precise date or dates "from which, under the foresaid qualification in the interlocutor "of 22d February, 1839, interest on the foresaid sum of L.3930, "4s. 6d., or the instalments thereof, commenced to run against "the defenders, and to decern for said interest in favour of the "pursuer."

On the 25th June, 1840, the Lord Ordinary pronounced this interlocutor: — "The Lord Ordinary, in respect of the minute to "that effect, holds the record closed in the supplementary action "upon the summons, defences, and pursuer's minute of debate; "and having heard parties' procurators, conjoins the said sup-"plementary action with the original action at the instance of "the pursuer against the defenders." The interlocutor then repeated the finding of the Court as to the payment of interest, and then proceeded thus: — "Farther, finds in the said conjoined "actions, that by reference to the quarry books and other evi-"dence in process, it appears, that giving full effect to the fore-"said qualification, the said sum of L.3930, 4s. 6d. was payable by "the defenders by two instalments, the first of L.2509, 5s. 10d. "on 1st August, 1826, and the second of L.1420, 18s. 8d on the "2d February, 1827: Finds, accordingly, that the pursuer is

" entitled, personally and individually, to payment from the de-
" fenders, of legal interest on L.2509, 5s. 10d., part of the said
" sum of L.3930, 4s. 6d., from the said 1st of August, 1826, and
" on L.1420, 18s. 8d. being the balance thereof, from the 2d of
" February, 1827, both until paid; and decerns and ordains the
" defenders to make payment to the pursuer, personally and in-
" dividually, of said interest, accordingly, along with the expense
" of extract, and allows this decreet to go out and be extracted
" *ad interim.*"

The appellants reclaimed against this interlocutor by a note, which prayed the Court " to alter the interlocutor submitted to " review; to find that the defenders are not liable in interest, as " found by the said interlocutor; and in particular, that they are " not liable in interest prior to the period when the amount of " the principal sum due by them shall be finally ascertained; or " otherwise, to alter or modify the findings in the said interlocu-
" tor, or to do otherwise in the premises as to your Lordship " may seem proper." On the 11th July, 1840, the Court adhered to the interlocutor of the Lord Ordinary.

The appeal was taken, with leave of the Court below, against the interlocutors of 22d February, and 15th November, 1839, 21st May, 25th June, and 11th July, 1840, without awaiting discussion of the questions as to the necessity for the heirs of entail being made parties; but the only grounds argued at the bar were, the liability to interest, and the competency of the decree for interest in the shape of the pleadings.

Mr Solicitor General, and Mr Bruce, for the appellants.—I. The footing upon which the Court below has found the respondent entitled to interest is, that, by the agreement between the parties, he sold to the appellants the stone under their canal, giving the agreement the character of a sale. The terms were specifically agreed upon, but the payment of interest was

not one of them. Interest, no doubt, is due in many cases *ex lege*, but where parties reduce the particulars of their agreement to writing, it is not competent, in this respect, to go beyond the terms of the agreement, *Ersk.* III. 3, 75; Wallace *v.* Geddes, 1 *Sh. Ap. Ca.* 42.

II. — But there is nothing in the terms of the agreement which at all sanctions giving the character of a sale to it. The agreement did not give the appellants a right to work the stone, neither was it the object of the parties that it should do so; indeed, if the respondent had adopted the first alternative of the agreement, the stone would not in any way whatever have formed matter for discussion between the parties; but, even under the second alternative, which the respondent did adopt, all that the transaction amounted to was a permission to the appellants to carry their works over the stone, paying the respondent a compensation for so doing.

III. — Though the workings on the north side of the canal discovered stone, as at November, 1825, it did not necessarily follow, that this stone extended to the other side of the canal, between the points C. and B., as reported on by Wood; and until this was discovered, there was no *data* for ascertaining the sum which the appellants ought to pay the respondent. That, as reported by Wood, did not occur until the year 1836, three years after the action had been brought; and Wood's report, which is alternative in its nature, and no way ascertaining the exact sum to be paid, but leaving that to the judgment of the Court, was not made till 1838. At the date at which the action was brought, there was nothing therefore to warrant it in regard to the principal sum, and still less in regard to the interest, so that there was not only no contract for the payment of interest, but no *mora* in the payment of the principal which could

make interest due *ex lege*. The appellants have not had any profitable occupation of the stone, neither have they deprived the respondent of such occupation. The working of the quarries, and the payment of rent by his tenants, has not in any way been disturbed by the operations of the appellants; there is the absence, therefore, of every ground on which interest is made payable.

IV. — The action originally brought did not contain any conclusion for interest, it was not therefore competent, under it, to make any decree for payment of interest. This defect might have been cured by amendment before the record was closed, but it was wholly incompetent to do so by supplementary summons after the record had been closed. Interest is merely an accessory of principal; it could never be allowed that a party should bring separate actions for the two; if not, then the proper course here was by amendment of the libel, not by supplementary action. This was to evade the terms of 6th Geo. IV. cap. 120, the object of which is to prevent any alteration of the record after it is closed.

Mr Pemberton, and Mr Andrews, for the respondent. — I. The true meaning of the agreement is, that the rock under the canal was to be held as having come into the market so soon as the workings on the north side had come up to the canal and discovered it: that it should thus be considered as sold to the appellants; and that the price should be paid in the same manner as if the stones had been worked and sold to the public, that is, that it should be paid for at the time at which it could have been worked. These periods have been held by the Court below to be, August 1826, and February 1827. There is no other character that such a transaction can bear than that of a sale. The use the appellants intended to put the stone to cannot make

any difference in the nature of the agreement with the respondent, or in his rights under it.

II. It was not necessary to contract, in the agreement, for the payment of interest; from the period at which the appellants became purchasers, and obtained possession, interest became due *ex lege* as a surrogatum for the use and enjoyment of the subject sold, without any regard to breach of contract or *mora;* 1 *Bell Com.* pp. 648, and 649, § 30; *Ersk.* III. 3. 79; Wallace *v.* Oswald, 3 *Sh.* 525. But even under the agreement interest is stipulated for; the respondent is to be paid the true worth; but he will not be paid the worth unless he obtain the interest as well as the capital sum.

III. If interest be payable *ex lege* from the date of obtaining possession, without reference to *mora*, it can make no difference when the exact amount of stone was discovered; the purchaser is not the less in the enjoyment, in the meanwhile, of the possession for which the interest is given as an equivalent.

IV. No objection was taken in the Court below to the competency of the supplementary action. The opinion of the Inner House, without which appeal is incompetent, was never taken upon that question; the objection is not even raised in the printed case for the appellants to this House; it is now made at the bar for the first time, and cannot be entertained, but it is capable of two answers, 1*st*, If interest is due *ex lege*, by implication, from the nature of the contract, and is then an accessory of the principal, it was sufficiently embraced, and might competently be decerned for under the terms of the original action. 2*d*, If the right to interest be separate and distinct from the right to principal, to be concluded for separately, then the supplementary action was for matter distinct from that embraced

by the original action, and is not liable to any objection founded on the 6th Geo. IV. cap. 120.

Mr Solicitor General, in reply.—It was not possible for the appellants, under the statute, to have reclaimed against the conjunction of the actions; but, moreover, the conjunction was unimportant; it was the finding of liability for interest which was the matter complained of, and that is sufficiently embraced by the prayer of the reclaiming note.

[*Lord Campbell.*—Can interest be given without a conclusion for it?

Lord Brougham.—Might not your reclaiming note have asked the Court to assoilzie from the supplemental action?]

It would not, perhaps, have been informal, but it would not have been usual.

[*Lord Brougham.*—Would it not have been competent for you to have asked the Court merely to alter the interlocutor?]

Certainly, but we could not have asked them to recall it in respect the action was incompetently conjoined.

[*Lord Brougham.*—You don't ask generally to alter, but go on to ask particular findings.]

But it is not at all clear, that under the 48th Geo. III. it is incompetent to appeal against an interlocutor which has not been reviewed by the Inner House. The 15th section, no doubt, says there shall not be appeals against interlocutors which have not been reviewed by the Inner House, but that is to qualify the part of the same clause as to appeals against interlocutors with leave of the Court; and, on the other hand, the proviso in the same clause declares, that when an appeal is taken it shall be competent to appeal against all or any of the interlocutors that may have been pronounced.

[*Lord Cottenham.*—My impression is, that the effect of the proviso was decided in this House within these two years back.—

Mr Anderson, amicus curiae.—It was decided in Jeffrey *v.* Brown.

LORD BROUGHAM. — My Lords, In this case I cannot concur in the interlocutors which have been pronounced in the Court below, either that of the Lord Ordinary, or the interlocutor adhering to it. We do not know the grounds on which the Court adhered to it, except that we have a very full and able note of the learned Judge, stating the grounds of his interlocutor; and we must assume that those arguments were adopted by the Court in affirming it.

Now, my Lords, it appears to me, that his Lordship and the Judges below must have proceeded upon the assumption of this being a contract of sale. I cannot liken it to a sale at all. It appears to me to be a bargain of this description: —

Leave is given by the owner of the land to the Canal Company to carry their canal over his ground, the consequence of which would be to deprive him or his lessees of the means of taking the stone under the canal; and in consideration of that permission, the Canal Company had agreed to pay him an equivalent for that loss. The natural and fair mode appears to have been adopted for that purpose, namely, that a lordship should be paid upon the stone, which, but for the working of the canal, the owner or his lessees might have gotten and sold. That is the nature of the transaction, and not a sale; there has been no sale of the ground or of the stone. If there had been a sale by the owner of the ground of the stone, and possession given of the stone in virtue of the sale, then might have arisen the question, though hardly a question, the possession vesting in the company, whether the party in possession should pay to the party giving up possession, the rents and profits during that time, estimated by the interest of the money. That does not appear to be the nature of the transaction, but it is a transaction of the other description to which I have referred.

That disposes of the question of interest, because, unless the was a contract to pay the money at a given day, which had pass by without payment, no claim of interest could have been co petent to the party. Now, what is the time at which inter upon the payment claimed is said to be due? Certainly n before 1836. I should say not before Mr Wood made h report, which would bring it to November, 1838, when tl L.3930 was first ascertained; and the only doubt I had in n mind was, whether between that period and the time of payi the money into Court, interest was due; but upon the best co sideration I have been able to give to it, it does not occur to n that there is any such laches or default upon the part of the parties, as entitles the owner of the ground to interest during th period. Application was made in the usual way to have tl money paid into Court; it is not pretended that that w resisted, nor is it pretended that the application was made duri any part of the previous years before the year when the mon was paid. It stands thus. It is known that the time the mon was due, was the date of Mr Wood's report, or the end of 183 And application was first made for it to be paid into Cou towards the latter end of 1839, and payment was then made in Court. In such circumstances, it does not appear to me th interest can be charged upon the party, independently of a other question to which it is necessary to advert upon the ple ings.

It seems to be pretty clear in a case of this description, tha demand having been made in the original summons for inte an amended summons would be necessary, but the party allo the time to elapse, within which it was competent to him amend; he allowed the record to be closed a considerable ti before the supplemental action was brought. After the mo was paid into Court, he brings his supplemental action to cu that defect. I consider the supplemental action an evasion

the act of Parliament, and that it was not a proceeding competent to the party. This ground of itself would be sufficient, independently of the merits.

Some doubt appears to be endeavoured to be raised upon the interlocutor of the 25th of June, 1840, and the reclaiming note is alluded to. The interlocutor "Finds of new in the conjoined "actions, that the defenders are bound to pay to the pursuer "personally and individually, the interest on the sum of "L.3930, which, in terms of Mr Wood's interim report, is the "ascertained value of the rock or stone already reported on by "him;" and that was most clearly and distinctly brought under the review of the Court by the reclaiming note; and though I still think it would have been more regular and safe for the parties to have called upon the Court to do what the Lord Ordinary ought to have done, to have assoilzied the party from the supplemental action, instead of conjoining it with the other, I am not prepared to say, that the finding in the conjoined actions being specifically brought under the review of the Court, was not sufficient to give the Court jurisdiction, and having done that, to remove all possible objection.

In whatever way I consider the proviso of the 6th of George the Fourth, I am not prepared to say that the reclaiming note was not sufficient to enable the Court to alter the interlocutor of the Lord Ordinary, and assoilzie the defenders, instead of conjoining the actions; in which case it is clear that this House would have the power of altering that part of the interlocutor of the Lord Ordinary, of the 25th of June, 1840, as well as the other important part regarding the interest; but it is not necessary to go into that, because, if your Lordships should be of opinion that you ought, as I should recommend you, to reverse the interlocutors generally, that would reverse the interlocutor finding the appellants liable to interest, and operate as a general reversal of the judgment of the Court below.

I therefore humbly move your Lordships, that the five interlocutors appealed from be reversed.

Lord Cottenham. — My Lords, It appears to me that the principle upon which the defenders have been found liable to interest cannot be supported. It has been assumed that they are to be dealt with as purchasers of some interest in the land, and therefore they are to pay interest upon the purchase-money from the time they were in possession. Now, it appears to me that that proposition fails in all its parts. It does not appear to me that it is a contract for sale at all, and if it was, there is nothing like possession from the date from which, by the interlocutor, interest is made to run; but it is merely a contract by which the parties agree to pay a certain sum of money for the right of making a canal over the land, which is to be paid at a certain ascertained time, or a time capable of being ascertained by a future event; the contract being to pay a sum of money so soon as the adjoining workings proved that the canal really did cover such rock. Now, it is quite clear, from the proceedings of the parties and the nature of the case, that the period at which that could best be ascertained, was when the workings on the south side of the canal ascertained that the rock on the north side passed under the canal. That was the fact upon which it rested, and that did not take place till 1836; and the only question would be, whether the interest did not become payable upon that fact being ascertained, or whether the party liable to pay interest in consequence of that being ascertained, was to be excused from the payment of interest till the amount was ascertained. If the pursuer had adopted a different course, and had proceeded upon the ground of its being in the nature of a contract between the parties, it might be a question requiring farther consideration. But that is not the course taken by the pursuer. In 1833, long before he was entitled to demand any interest, he instituted this suit, and made a much larger demand than he was able to establish; and

I cannot help thinking, after that suit was instituted, the defenders were put under the jurisdiction of the Court, and they might be said to be in default for not doing that which they ought to have done; if a charge of interest had been made, they might possibly have been liable to it, if the demand had been made in the regular course. After the suit was instituted, and pending the suit, the Court, moved by the pursuer, adopted certain proceedings to ascertain the amount of the rock covered, and the amount of the money to be paid to the pursuer. It does not appear that any resistance was made by the defenders, but as soon as it was ascertained, the order of the Court was complied with for the payment of the money into Court. On the merits, therefore, I should have found no difficulty in coming to the conclusion, that during no portion of the period that elapsed from 1836 till the money was paid into Court, did any liability attach for the payment of interest.

But when the course of the pleadings is considered, another difficulty is raised, which seems to me equally fatal to his claim. He makes a large demand in 1833, without any claim for interest. In the course of the proceedings, it being suggested to him in the grounds upon which the interlocutor was rested, that this might be converted into, or that the Court might view it as, a contract of sale, the supplemental summons is filed, and in that he claims, what he could not claim nor obtain by any alteration in the original summons, as he had not demanded it. That supplemental summons, so instituted, appears to me to be clearly irregular. The Lord Ordinary conjoined the two proceedings on the part of the pursuer, and upon looking at the terms in which the reclaiming note is framed, it appears to me it was calculated to bring before the Inner Court all that was done by the Lord Ordinary, and all the matters which were in debate before him. It reclaims against the interlocutors, and contends, that they ought to find that no interest was payable;

and one of the objections to the payment of interest was, that it had not been claimed by the original summons. That brought the question before the Court, whether the party was liable, and upon that it would be competent to the party to claim an exemption from interest upon the merits, as well as upon the formal objection of no demand having been made.

Being of that opinion, it is unnecessary for me to consider whether the proviso in the act of Parliament does not authorize the party to come here, upon the interlocutor of the Lord Ordinary, not brought by the reclaiming note before the Inner House, where there has been a final adjudication, which makes it necessary to consider the merits of the intermediate interlocutor.

It is also unnecessary to say any thing more upon the case of Jeffery *v.* Brown, which has been cited, because on the examination of that case, it appears to me it does not raise that question; it proceeded upon the proviso of the act which declares that there shall not be an appeal to this House upon an interlocutor not made the subject of reclaiming note. In that case, it appeared that the party was the representative of a Mr Watson, and the objection was, that the appeal was incompetent in so far as regarded the representative of Mr Watson, as the interlocutor complained of was against Mr Watson in his character of trustee. The case states, that the interlocutor being pronounced, Mr Watson, as trustee, did not complain of that interlocutor, and by a subsequent order he was discharged from being such trustee and exonerated. He acquiesced in the interlocutor, and was no party to the subsequent proceedings, but his representatives afterwards came, and reclaimed against it; that interlocutor was a final interlocutor, and was not the ground-work of any subsequent interlocutor, and therefore it has no application to what occurs in this case, namely, the supposition that the reclaiming note does not embrace that part of the interlocutor under discussion, and it has no bearing upon that part of the case.

Upon these grounds it appears to me, both upon the merits, on the conduct of the parties, and the form of proceeding adopted by the pursuer, that he has failed to make out any claim to the interest upon the money in question.

Lord Campbell. — My Lords, If this case had depended upon the question, whether we could take cognizance of, and reverse the interlocutor, or part of the interlocutor, of the Lord Ordinary, not brought before the Inner House, I should have wished for time to consider whether the words of the act of Parliament are strong enough to give the Court jurisdiction; and as some considerable inconvenience might arise from a contrary construction, I should have wished to have seen what was done by the Court under such circumstances in cases which already had arisen. But, my Lords, without at all considering that question, we may, I think, without any difficulty, reverse these interlocutors as far as interest is concerned.

Now, this is clearly an action of contract, and the burden is upon the respondent, to shew that by his contract he is entitled to interest under the circumstances which have occurred. The contract contains no express stipulation for interest, he must therefore shew that there is an implied obligation on the part of the appellant to pay interest, under the circumstances which have taken place.

It seems to me that it is a fallacy to suppose that this is a contract of purchase and sale. I think there is no analogy between this case, and a case where a real estate is sold, and the purchaser is in possession, and liable to pay interest from that time. This is a contract by which the respondent was to be indemnified for an agreement into which he had entered, to allow the canal to be carried over his land, and that he would not work the minerals under the canal. He was to be placed in the same situation as if his lessees had worked the stone; if they had worked it, he was to receive a lordship, and the lordship that

would have been paid by the lessees was to be paid by the company, and according to the contract it was to be paid at a particular time. It was to pay a lordship upon whatever stone the canal should cover, so soon as the adjoining workings proved that it did really cover the rock. It was therefore a contract to pay a sum of money at the particular time here mentioned. Now, if before any action had been brought, it had been ascertained that the stone did come to the south side of the canal, and it had been ascertained what the quantity of stone was, so that the principal sum of money could have been ascertained, I think interest would have clearly run from the time the amount was so ascertained, if not from the time when it was clearly established that the rock did run at the other side of the canal. But when this action was brought in 1833, it had not been ascertained that the rock did come to the south side of the canal, the time had not arrived when the principal sum was to be paid. Therefore, at the time the action was brought, no interest could have been given, and there was no ground for including in the summons the demand for interest.

Then, during the progress of the cause, it turned out upon a reference to Mr Wood, that upon a given day there was a certain sum which was due, but this was long after the action had been commenced, and there was no default at all upon the part of the Company. There was at first a prospect of ascertaining what the amount was, but when the amount had been ascertained, there was no application to pay the money into Court till 1839, and then it was paid into Court. I am therefore of opinion that no interest is recoverable.

But, my Lords, I am also clearly of opinion, that, as is admitted, according to the form of proceeding in Scotland, interest could not be awarded by the Court. Unless there was an allegation or prayer in the summons for interest, upon the ground that interest had become due, it could not be recovered. Now, here

the plaintiff thought right, instead of an amendment, to file a supplemental summons. This, I agree, is a clear evasion of the statute. If interest was due, that interest was only accessary upon the non-payment of the principal, and if there had been judgment for the respondent regarding the principal without any demand of interest, he could not have brought a separate action claiming interest, he having omitted to claim interest in the action brought for the principal. If that be so, how could he bring a supplemental summons, which is only tantamount to an amendment of a defective summons. The act has expressly said there shall not be any such amendment under circumstances such as these, and the supplemental summons is only an amendment.

I was a little startled by the mention that the irregularity had been cured by the form of the reclaiming note; but when I look at the reclaiming note, which is now before me, I think it embraces the whole of the interlocutor. I am of opinion, that the Inner House might have assoilzied the defender from the supplemental summons with expenses. I am of opinion that that is the judgment which the Inner House ought to have pronounced, and I am of opinion that the judgment which this House ought to pronounce is, that this supplemental summons ought not to have been conjoined with the original summons, but dismissed with costs.

I therefore concur in the opinion of my noble and learned friends, that these interlocutors should be reversed in the manner described, and that the supplemental summons ought to be dismissed; and that the defenders ought to be assoilzied with costs.

Lord Brougham. — It is quite understood we give no opinion upon that part of the interlocutors relating to the principal sum; we allow all excepting the interest.

It is Ordered and Adjudged, That the said interlocutors complained

of in the said appeal, in so far as the same find the appellants liable in payment of interest upon the ascertained value of the stone under the canal, be, and the same are, hereby reversed: And it is farther Ordered and Adjudged, that the case be remitted back to the Court of Session in Scotland, with directions to assoilzie the defenders from the conclusions of the supplementary summons, and to find them entitled to the expenses of the proceedings consequent thereupon, in the said Court, and to make such other orders regarding the sum consigned in the hands of the Bank of the British Linen Company, and interest accrued thereon, and to do otherwise in the cause as shall be just, and consistent with this judgment.

RICHARDSON & CONNELL — G. & T. W. WEBSTER, Agents.

[27th May, 1842.]

The MONKLAND and KIRKINTULLOCH RAILWAY COMPANY, *Appellants.*

WILLIAM DIXON of Govan Colliery, and MESSRS WILLIAM DIXON and COMPANY of Calder Iron Works, *Respondents.*

Statute. — *Railway.* — Where a statute for the construction of a railway declared, that it should not prevent the owners or occupiers of ground through which the railway might pass from carrying any railway or other road, which such owner or occupier was authorized to make, across the main railway, "within the lands of such owner "or occupier," *held*, that the privilege was not confined to the state of the ownership or occupancy at the date of the act.

THE Monkland and Kirkintulloch Railway was formed under the powers given to the appellants by an Act of the 5th Geo. IV. cap. 49. passed in the year 1824.

The 65th section of that statute declares, — "Provided "always, and be it enacted, that it shall be lawful for the owners "and occupiers of the respective lands or grounds through "which the said railway shall be made, and his, her, and their "servants and workmen, cattle and carriages, at all times to pass "and repass directly, over and across such part of the said rail-"way as shall be made in and upon the said lands or grounds "respectively, not damaging or wilfully obstructing the same, "or the passage thereof, without payment of any toll or tonnage "for the same, provided they shall not pass along any other part "of the said railway: Provided also, that it shall be lawful for "the occupier or occupiers of the respective lands or grounds "through which the said railway shall be made, and his, her, "and their servants, having authority in writing for all or any "such purposes from the said company of proprietors or their "committee, to ride, lead, or drive any horse, mule, or ass, cow,

" or other neat cattle, sheep, swine, or any other beast, along " the said railway, as far only as the lands in his or her own " occupation shall extend, for the purpose of occupying the same " lands, such person or persons not damaging or wilfully ob- " structing the said railway, or the passage thereof."

The 79th section enacts, — " That after ten days' notice in " writing given to the proprietors of the said railway, it shall " and may be lawful for any body politic, corporate, or collegiate, " or any other owner of any grounds adjoining the said railway, " to lay down a branch or branches from his or her lands or " grounds, to communicate with the said railway, and to make, " at his, her, or their own expense, in such manner as shall be " agreed upon by and between the proprietors of the said rail- " way and such party or parties, and in case they cannot agree, " then in such manner as shall be settled by two or more Justices " of the Peace for the said county of Lanark, such openings into " the ledges or flanches of the said railway, not injuring the " same, as may be necessary and convenient for effecting such " communication or crossing, without the said company being " entitled to receive tonnage-rates for the passing of minerals, " goods, or other things along such branch or branches, but " without prejudice, nevertheless, to the receiving of such ton- " nage-rates for the passing of such minerals, goods, or other " things along the said railway."

The 80th section declares, — " And be it farther enacted, that " nothing herein contained shall be construed to prevent any " owner or occupier of any ground through which the said rail- " way may pass, from carrying, at his or their own expenses, " any railway or other road, or any cut or canal, which such " owner or occupier is authorized to make in his or her lands or " grounds, across the said main railway, within the respective " lands or grounds of such owner or occupier."

And the 81st section declares, — " Provided also, and be it " farther enacted, that if any person or persons shall make upon

" his, her, or their own lands or grounds, any branch or branches " running parallel or collateral with the railway hereby autho- " rized to be made, which shall join the said last-mentioned rail- " way, (otherwise than for crossing the same,) it shall be lawful " for the said company of proprietors to demand and take for " every waggon, cart, or other carriage travelling along such " branch or branches, on joining and using the said main rail- " way, the same rates of tonnage for the distance travelled by " such waggon, cart, or other carriage, upon such parallel " or collateral railway, as would have been leviable, for such " waggon, cart, or other carriage, for travelling the like distance " upon the said main railway."

The respondent, William Dixon, was the owner of the lands of Garturk, which were occupied under him by the respondents, Messrs William Dixon and Co. of whose firm he was a partner. The line of the railway intersected these lands.

In 1831 the appellants purchased from the respondent Dixon, under the powers of the statute, a portion of these lands necessary for the formation of the railway at this point, and obtained from him an ordinary conveyance.

In the year 1836, the respondents obtained from Sir William Alexander a lease of the lands of Rochsholloch, which contained very valuable minerals. These lands adjoined the lands of Garturk, but neither were intersected by, nor adjoined the appellants' railway.

In the year 1838, the appellants presented a petition to the Sheriff of Lanarkshire, setting forth,—" That one part of the " said railway extends along or near the north side of the Calder " Iron-Works in the parish of Old Monkland, and there passes " through and intersects the grounds of Easter and Wester " Garturk, belonging to William Dixon, Esq. of Govanhill, or " to Messers William Dixon and Company of Calder Iron- " Works. That the petitioners have received notice that the " said William Dixon or William Dixon and Company intended

" to enter upon the petitioners' grounds and railway, where the " same intersect the said lands belonging to them, and to make " and form a branch railway across the railway belonging to " your petitioners. That your petitioners have good reason to " believe that it is the intention of the said William Dixon or " William Dixon and Company, in making and forming the " said branch railway, not to confine the same within the said " lands or grounds belonging to them, but to extend it to lands " lying beyond the same, belonging to the Right Honourable " Sir William Alexander or others. That, while the said " William Dixon and William Dixon and Company are en- " titled by the 80th section of the said statute, to carry a railway " across the petitioners' railway, within their respective lands or " grounds, so as to communicate between one part of the same " and another, yet they have no right to enter upon your peti- " tioners' property and railway, and form across the same any " railway or other road which is to extend beyond the lands or " grounds belonging to them. That, notwithstanding thereof, " the object and intention of the said defenders, in proposing to " form the said cross railway is, that they may extend the same " to lands lying beyond those belonging to them, and may " thereby convey ironstone and other minerals to their works " called the Calder iron-works, to the loss and prejudice of your " petitioners, by whose railway the said minerals would otherwise " be transported, and contrary to the provisions of the statute " passed in their favour hereby founded on, and herewith pro- " duced. That the said William Dixon and William Dixon " and Company, having declined to give your petitioners any " undertaking — that the railway proposed to be executed by " them as aforesaid shall not be extended beyond the said " grounds belonging to them — the petitioners have no remedy " but to apply to your Lordship."

Upon this narrative the petition prayed the Sheriff, after notice to the respondents, and advising any answer they might

put in, to " interdict, prohibit, and discharge the said defenders, " jointly and severally, from making and forming any railway or " other road across the railway belonging to your petitioners, " excepting always, and reserving to the defenders, right to " carry a railway or other road across your petitioners' railways " within the said lands or grounds belonging to the defenders, " in terms of the provision before referred to; and, in the mean- " time, to interdict, prohibit, and discharge the defenders from " entering upon your petitioners' grounds and railway to the " effect of forming any railway or other road across the same, so " as to extend to, or communicate with, any lands or grounds " other than those belonging to the defenders as aforesaid; to " find the defenders liable in L.10 sterling, or such other sum, " less or more, as shall be found to be the expenses hereof, and " of the procedure to follow hereon; or to do otherwise in the " premises, as to your Lordship shall seem proper."

An interim interdict was granted upon this petition, and thereafter the respondents put in answers, in which they maintained, — " 1. The respondents have, at common law, the " undoubted right of forming railways on their own lands, and " of extending the same into the lands of such other proprietors " as may consent thereto, or of connecting them with such other " railways as may be lawfully formed on the lands of such " adjoining proprietors. 2. These rights, which the respondents " enjoy at common law, are in no respect diminished, restricted, " or taken away, by the statute founded on by the petitioners. " 3. The respondents, as owners and occupiers of lands through " which the petioners' railway passes, are expressly declared " entitled by that act, to carry such private railways across the " petitioners' railway, without paying any dues for the use " thereof. 4. Even if the respondents were not entitled to carry " their proposed railway beyond their own lands, the petitioners " have no right to interfere with their proceedings, until they " shall have transgressed such prescribed limits."

Replies, condescendence and answers, and minutes of debate, were put in for the parties. On advising these pleadings, the Sheriff, on 7th May, 1838, pronounced the following interlocutor:—"Having considered the minutes of debate, and re-"considered the whole process, finds, That by sect. 80 of the "act founded on by the pursuers, owners or occupiers of any "ground through which the Kirkintulloch railroad passes, are "entitled to make railroads across it, within the respective lands "of such owner or occupier: Finds it admitted that the "defenders are proprietors of land at the point where the cross "railroad is intended to be made: Finds this proved by lease "No. 21 of process, that they are occupiers of the lands of "Rochsolloch: Finds, therefore, that under the above clause of "the act, they are entitled to make the proposed cross railroad, "and continue the same to the grounds occupied by them at "Rochsholloch: therefore recalls the interdict, dismisses this "action with expenses, of which allows an account to be given "in, and remits the same to the auditor to tax and report, and "decerns."

The appellants reclaimed against this interlocutor, and on the 28th June, 1838, the Sheriff pronounced the following interlocutor, adding the subjoined note:—"Having resumed consi-"deration of this process, with the reclaiming petition for the "pursuers, and answers thereto, for the reasons assigned in the "note below, recalls the interlocutor complained of, declares the "interdict perpetual, finds the defenders liable in expenses, of "which allows an account to be given in, and remits to the "auditor to tax and report, and decerns. *Note.*—The Sheriff-"substitute is now convinced that he took an erroneous view of "the clause of the act upon which the interlocutor now recalled "was founded; and he is perfectly satisfied that clause can bear "no such interpretation. It has reference solely to the owners "or occupiers of land through which the railroad was to pass, "and with the very equitable view of preventing the injury of

" property to a greater extent than was absolutely necessary for " the railroad; and it now appears that the doctrine laid down " in the former interlocutor would have the effect of authorizing " any individual to cross the pursuers' railroad by another, and " continue the same as far as they could obtain a right so to do " from neighbouring proprietors, and this might easily be done " by a lease, and in this way great damage would be inflicted on " the pursuers. The grounds of the above interlocutor are the " following:— The only right which the defenders have to cross " the railroad in question, the property of the pursuers, flows " from the act of Parliament in process. The right there given " of crossing said railroad is expressly restricted to railroads " made within the lands or grounds of any owner or occupiers " of grounds through which it passes. Now the railroad " belonging to the pursuers does not pass through the lands of " Rochsholloch, and therefore the defenders are not entitled to " carry their railroad beyond the limits of the ground belonging " to them, and through which the railroad passes, and then con- " tinue it to the lands, the occupancy of which has been acquired " only lately."

The respondents appealed to the Sheriff-depute, and on the 24th July, 1838, the following interlocutor was pronounced:— " Having advised with the Sheriff, who considered the interlo- " cutor appealed from, and reviewed the process, adheres thereto, " for the reasons stated in the note to the last interlocutor of the " Sheriff-substitute, and dismisses the appeal. *Note.*— The " whole question here turns upon the import of the clause, which " provides, 'That nothing contained in the act shall prevent any " owner or occupier of any ground through which the railway " may pass from carrying any railway, or other road, or any cut " or canal which such owner or occupier is authorized to make " in his or her lands or grounds, across the said main railway,

" within the respective lands or grounds of such owner or occu-
" pier.' There can be no doubt, that the construction which
" the Sheriff-substitute has latterly put upon this clause, is the
" well-founded one. The power of crossing the main railway,
" by other railways, is here expressly limited to the proprietors
" of the ground through which the first-mentioned railway passes.
" The power of forcibly compelling the proprietors of the main
" railway to admit a second across it, is limited to the proprietors
" of lands, and within their lands, and the Court is not autho-
" rized to extend the power to any class of persons, but those
" specified in the act of Parliament."

The respondents carried the case by advocation to the Court of Session, and on the 18th of February, 1840, the Lord Ordinary, Jeffrey, pronounced the following interlocutor, adding the subjoined note:—

" The Lord Ordinary having heard the counsel for the parties
" on the closed record, and whole process, and made *avizandum*,
" advocates the cause; alters the interlocutors of the Sheriff com-
" plained of; and finds, that according to the true meaning and
" just construction of the 80th section of the statute in question,
" nothing more is required than that the point of crossing the one
" railway with the other, shall be wholly within the lands of the
" party by whom the most recent of these railways is constructed,
" and that no limitation or restriction is thereby imposed on the
" common law right of the owner or occupier of such lands to
" continue or extend the said new railway into any adjoining
" properties where he may have leave to carry it; and, therefore,
" recalls the interdict granted by the Sheriff; sustains the defen-
" ces against the original action, at the instance of the said com-
" pany; assoilzies the complainers from the whole conclusions
" thereof, and decerns; Finds expenses due both in this Court
" and before the Sheriff; allows an account thereof to be given
" in, and remits to the auditor to tax and to report."

" *Note.*— This is conceived to be the natural and obvious reading " of the section as it stands. But when the whole structure and " policy of the statute in its context, and all its relative provisions, is " attended to, it seems to the Lord Ordinary that no other construc- " tion can be even plausibly maintained.

" By the 65th section, which is the first that bears upon the pre- " sent question, and is of leading importance as to the construction, " the most ample powers are given to the owners and occupiers of " lands traversed by the company's railway to cross it at all points, " and at their pleasure, not only by themselves, workmen and cattle, " but expressly 'with horses and carriages.' The words are, 'that it " 'shall be lawful for them and their servants, workmen, cattle, and " 'carriages, at all times, to pass and repass over and across the said " 'railway (not damaging or obstructing the same) without payment " 'of any toll or tonnage for such passage,' &c. Now, under this " section, it is thought to be clear, that the owners or occupiers might " carry any ordinary road across the railway, at any point within " their lands, since they could not well cross it with carriages in any " other way; and as it would be palpably absurd to suppose that " there was any thing in this general permission, out of which a pro- " hibition to exercise their common law right of forming roads on " their own lands could be construed. But, if this be perfectly clear, " is there the slightest ground for holding that the roads so to be " carried across the railway at pleasure must necessarily be roads be- " ginning and terminating within the lands, belonging to the party who " makes the crossing? There is not a word in this 65th section, at " all events, upon which the possibility of such a limitation having been " intended can be rested. There is nothing importing a limitation to " roads wholly within the same property, or for the mere use or con- " nection of its several parts. The words, on the contrary, are quite " general, 'to pass and repass with cattle and carriages over and " 'across the said railway, at all times;' and, of course, as there is " no limitation, for all purposes, and in all respects, as freely as they " might have passed over the same space or area before it was occu- " pied by the railway of the company. If the immediate owner, " therefore, had his neighbour's leave to prolong his roads into this

" property, or if these roads fell at either end, and within his own " lands, into public or market roads, it is thought to be sufficiently " clear that he might use them for the purpose of such communica- " tion, just as freely after he had taken them across the Company's " railway under the broad and ample permission now cited, as he " might have done before that railway came into existence.

" But if this would certainly be true of any ordinary use of passage, " or of any metalled or paved road, which the owner might construct " for the purpose of such passage, why should it not be true also of " any railroad which, in the exercise of his unquestionable common " law right and privilege, he might have chosen to make for the same " purpose? Or why, it may be asked, was a separate and dis- " tinct provision made for the right of crossing by such railroads? " These questions, the Lord Ordinary thinks, are most material, and " the answers to them seem to him to bring out and lead naturally to " the view by which the true construction of the statute in this " respect may be best ascertained. He is of opinion that, under the " 65th section, the adjacent owners might have made railways to " cross that of the company, as freely as roads of any other descrip- " tion; and he thinks that this is distinctly recognized and intimated " by the subsequent special provision of the 80th section, the true " object and purpose of which, in his apprehension, was mainly to " secure the continuance of that right, and to save it from the risk of " being brought into question by any rash or too extensive construc- " tion of the section immediately preceding; and, accordingly, it does " not purport or profess to confer any new or special powers on the " adjacent proprietors, but merely to guard against the possibility of " their existing and acknowledged powers being narrowed or chal- " lenged by a misunderstanding or misconstruction of the preceding " enactments, the proviso in that 80th section being expressly, 'That " 'nothing herein contained shall be construed to prevent the owners " 'or occupiers of grounds through which the said railway may pass, " 'from carrying any railway or other road,' (here classing them to- " gether, and bringing both within the benefit of the 65th section,) " 'which he may be authorized to make on his lands, across the said " 'main railway, within the respective lands of such owner or occu-

" 'pier.' This of itself seems sufficiently conclusive. But to see " clearly the true import and object of the provision, it is necessary " to look back to the 79th or immediately preceding section, while " the general policy of the act as to the rights of adjoining pro- " prietors, and the small extent of monopoly it meant to give to the " Company, are conclusively illustrated by the 81st or immediately " succeeding section. The whole three, in short, are connected, and " ought to be read together, as bringing out the mind of the Legis- " lature on the whole subject of discussion.

" The 79th gives adjoining proprietors right to lay down branch " railways, to communicate with or fall into that of the Company, and " that in the amplest and most comprehensive manner, and without " subjecting them to any payment or contribution, but only requiring " that they shall give previous notice to the Company, and agree with " them, or by referees, as to the nature and construction of the open- " ings by which the junction with the main railway is to be effected, " and also that they shall pay the regular tonnage duties for the com- " modities which may be brought by such private branches into the " main work.

" Then follows the 80th section, already recited, providing substan- " tially, as the Lord Ordinary understands it, that, though duties are " thus to be charged upon goods actually coming into and passing for " some way on the main railway from private adjacent ways, this shall " never be construed as derogating in any degree from the rights con- " ferred by the 65th section, of proprietors merely crossing the said " railway with carriages on their grounds, without any payment of " tollage or tonnage whatever, and that whether they cross by private " railways or roads of any other description.

" And then finally, and to shew how little it was intended to re- " strain the adjoining proprietors from having private railways, even " in situations which might interfere or compete with that of the " Company, and to what a very small extent their interests as to such " competition are protected, comes the 81st section, by which it is " enacted, that if any adjoining proprietors shall make railways on their " own grounds, running parallel with that of the Company, 'and which " shall join the said Company's railway otherwise than for merely

" ' crossing the same,' then, and in that particular case, the owners " shall be chargeable with tonnage-duties for the space their goods " have come on the private railway, previous to falling into the main " one, as if they had passed all along on the latter. Now, from this " enactment, it is quite plain, 1st, That if proprietors choose to con- " struct railways for their own use, closely adjoining and absolutely " parallel to that of the Company, they are at full liberty to use them " to any extent, and for all purposes, exactly as if there was no public " work in the neighbourhood; provided they never at all join, fall " into, or come into actual contact with that of the Company. And, " 2d, That, if after running parallel to that railway for any distance, " on one side of it, they choose merely to cross it, in order to run " parallel to it again on the other side, they are at full liberty to do this " also, without payment or contribution of any sort or description. " It is conceived, however, to be quite plain that, in regard to those " parallel private railways, by which alone any injurious competition " with the Company could be occasioned, there is not a word in the " act by which the adjoining proprietors, from one end to the other of " the Company's line, could be restrained or precluded from exercis- " ing their undoubted common law right of joining together to make " one continued private railway to the whole extent of that line, and " accommodating each other with the use of it for their mutual benefit " or convenience. By the statute, in short, no monopoly of power to " interfere with the ordinary rights of property in their vicinage is " conferred on the Company, except singly as to such private rail- " ways as, after running for some way parallel to theirs, do at last fall " into it, and are not ' merely carried across.' With regard to all " other such ways as do not at all touch it, or touch it only to cross " —for the two cases are plainly held to be altogether identical— " there is no restraint or limitation whatever, either as to the right to " make or to use them, in any number or direction that may be pre- " ferred; and exactly as if there had been no public work of the sort " in the neighbourhood. It is a cardinal maxim, indeed, and rule of " law, that none of the natural and inherent rights of property shall " ever be held to be taken away by implication, or without the clear " and express enactments of a statute; and if it be undeniable that

" private railways may be made and used, and continued to any ex-
" tent, close to that of the Company, and even in the same direction,
" (provided they do not actually touch it,) without any right of in-
" terference on their part, it seems quite impossible, when all the
" provisions about crossing are considered, to doubt that the same
" unlimited common law right extends to such ways as merely cross
" the main line, but do not use it in any way as a means of convey-
" ance. There is not only the general permission to cross at pleasure
" in the 69th section recognized and expressly extended to railways,
" as a means of crossing in the 80th, but in the 81st, where certain
" burdens are laid on such parallel railways as fall into that of the
" Company, there is an express exemption of those that only fall into
" it 'merely for crossing the same,' which last are thus put precisely
" on the same footing with those which do not touch it at all; as to
" which last there can be no question that the adjoining owners, and
" their neighbours, are under no restraint whatever, but may extend,
" and connect, and combine their operations as they severally please,
" or can jointly agree, exactly as if the Company's railway had no
" existence.

" If there was nothing else in the case, indeed, but the apparent
" want of intelligible interest in the Company to insist on such a
" limitation as they contend for, this alone would be sufficient (where
" there was the least doubt on the words) to exclude the supposition
" that it could have been intended to impose such a limitation.
" Commodities carried on a railway crossing, (and in this case nearly
" at right angles,) that of the Company, plainly could never have gone
" by that public railway, even if the other had not existed; and being
" destined for places in a totally different direction, the means or
" facility of their conveyance to such places must obviously be matter
" of absolute indifference to the corporation; and, therefore, when
" we see that they are not in any way protected from the competi-
" tion of private ways going in the very same direction with theirs, it
" is certainly the most unlikely of all things, that they should have
" stipulated for, or the Legislature have granted, an interference with
" the common law rights of property, to prevent an incomparably
" slighter, or rather entirely imaginary interference.

"The whole argument for the respondents is based upon the assump-
" tion, that, being proprietors of the space occupied by their railway,
" the right to cross it by any party must necessarily be considered as
" a servitude merely; and that as this is given only to the owners
" of the grounds through which it passes, so it must be considered as
" given for the exclusive use or benefit of the grounds, which are to
" be viewed as the *dominant tenement*, and cannot therefore be ex-
" tended or communicated to any adjoining properties in conformity
" with the decision in the case of Scott and Bogle, 6th July, 1809.
" (15 *F. C.* 397.)

" There is some ingenuity, certainly, in thus attempting to ana-
" lyze the right of the complainer into certain technical elements, and
" insisting on dealing with it as falling exclusively under these deno-
" minations. But it is impossible, by any such device, to disguise the
" fact, that the question is one of a mere statutory construction, and
" must be decided according to what is ultimately held *tota re per-*
" *specta*, to have been the true meaning and intention of the Legis-
" lature. To that question, accordingly, the Lord Ordinary has ex-
" clusively addressed himself, and has stated the grounds on which,
" he thinks it should be determined. It may be an element, perhaps,
" in that determination, that the right claimed by the Company is of
" the nature of or akin at least to a right of servitude, and that it may
" therefore be held probable *in dubio* that it was not intended to give
" it except for the use of a dominant tenement. But beyond this the
" suggestion and the law of predial servitudes has plainly no opera-
" tion, and can never exclude the consideration of all the other ele-
" ments by which the true intention may be established. Even look-
" ing upon it as the new constitution of a servitude, it appears to the
" Lord Ordinary that it is not so properly a servitude of using a way
" across the Company's railroad, for the service of the adjoining pro-
" perty, as a servitude of making and repairing a crossing for the
" continuation of a road to be used for all legal purposes, and as freely
" as if there had been no such obstacle to be crossed. The words are
" merely that the owner 'shall not be prevented from carrying any
" railway or other road across the said main railway, within the lands
" or ground of the said owner or occupier.' Not a word being said of

" the use to be made of it, or any reference to the special service or " benefit of the said property lands. The fact that the road so to be " carried across is described in the act as a road which the owner " must 'have been authorized to make on his own grounds,' cannot " possibly import such a limitation. If it was to be described at all, " it could not possibly receive any other description. Being neces- " sary to be carried across the main railway within his own grounds, " it must necessarily have been within them at both sides of the " crossing; and therefore no more ample or comprehensive descrip- " tion could have been devised for giving the greatest possible exten- " sion to the privilege conferred, than to say that it should apply to " all roads (railways or others) which the owner might have con- " structed, or be entitled to construct, on his own lands. By the " words of the act, the road must have been on the grounds of the " owner at the crossing; and as it is he alone who is thereby entitled " to make the crossing, the only correct description of the road in " relation to the matter in contemplation, was that of a road existing " on both sides of the crossing within the limits of these grounds. " But this can never warrant an inference that it could not lawfully " be carried beyond these limits. In truth, however, the Lord Ordi- " nary cannot consider this as a grant of servitude at all, and least of " all, *servitus itineris ubi prædium servit prædio.* It seems to him, on " the contrary, as expressed both in the 65th and the 80th sections, and " in the exceptions of the 81st, to be no more than a mere statutory " declaration that the Company's railway shall be no obstacle to the " continuation of any road, new or old, which exists, or may be legally " formed, in a direction to cross that railway; and that the owner " of the lands where the crossing is required, may effect such crossing " accordingly at any point or points of his own property. There was " no thought, it appears to him, of any limitation as to the extent, or " use, or connection of the road so to be carried across; and as there " are undoubtedly no such limitations expressed in the act, he cer- " tainly sees no ground upon which they should now be inferred, or " supplied as by implication.

" As the complainer seeks only to extend his railway, for his own " individual use, into an adjoining property in which he has a right

" to the minerals, the Lord Ordinary has limited his findings so as " only to justify or affirm his right so to extend it. It may be seen, " however, from the preceding observations, that he would be inclined " to affirm it to a much greater extent, and to sanction the commu- " nication and prolongation of it for the use of any neighbours with " whom he might make an agreement, and who might all use it for " their joint accommodation, — the statute requiring no more than " that the actual crossing should be made by the owner of the grounds " within which it is effected. But as the decision of the present case " requires no such findings, and as there are expressions in the 65th " section which might raise a doubt upon the point last mentioned, " he would be understood as having formed no judicial opinion beyond " what is expressed in the judgment."

The appellants reclaimed against this interlocutor to the Inner House, and on the 18th July, 1840, the Second Division of the Court pronounced the following interlocutor: — " The Lords " having resumed consideration of the cause, and heard counsel " for the parties, adhere to the interlocutor of the Lord Ordi- " nary submitted to review, refuse the desire of the reclaiming " note, and decern: Find additional expenses due; allow ac- " counts thereof to be given in, and remit the same, when lodged, " to the auditor to tax and report."

The appeal was against these interlocutors of the Lord Ordinary and the Court.

Mr Pemberton and Mr Kelly for appellant. — The right asserted by the respondents, and given effect to by the interlocutors of the Court below, is to make a railway, crossing that of the appellants, which may be carried throughout the length of Scotland, and be used by any or every body for any or every purpose. But both on a legal and a grammatical construction of the 81st section of the appellants' statute, it is plain that it was never intended

to confer upon them any such right; all that was intended by the legislature in that section was to give parties holding lands intersected by the railway, every reasonable enjoyment of them consistent with the use of the railway, by permitting them to make, for the use of their own lands, a railway road, or canal, to be confined to the limits of these lands; unless this be the correct construction of the 80th section there is no meaning which can be affixed to the words, "within the respective lands or grounds "of such owner or occupier."

It is not pretended that what the respondents were attempting to do, was under the powers given by the 79th section, that section was intended for another and very different purpose, the connecting of branch lines with the trunk line of the respondents, which, instead of causing injury or obstruction to the appellants, would contribute to their advantage and emolument. But it is avowed, and not attempted to be concealed, that their operations are carried on under the 80th section, as giving them a right to cross the railway of the appellants at a tangent, either with a railway or a canal, and to cause to the appellants all the necessary obstruction to the use of their railway, which the accomplishment of such a purpose must necessarily occasion, and that without making to the appellants any compensation for so doing, although these operations are not for the enjoyment of the respondent's own lands, but for the purpose of general trade and communication.

The appellants have purchased the land on which their railway is formed, and as to the ground which they have so acquired, though for a special purpose, they are entitled to all the rights which the law confers on ordinary proprietors, unless in so far as the statute expressly and indubitably limits these rights. It will not be implied that the respondents can have any right to come upon the lands of the appellants, to do them such injury as has been suggested, without making any compensation for so doing;

but this is the construction which by implication from the words used, they desire to put upon the 80th section of the statute. It is plain, however, that the legislature never intended to authorize such injustice, and reason and common sense, as well as the correct legal construction of the section, shew, that all that was intended was to give to proprietors, the entirety of whose lands was disturbed, a right of communication between the parts intersected.

[*Lord Brougham.* — You say a railway or canal to his own close.]

Yes. Like the usual case of a road for the use of a particular estate. The party may use the road for the purposes of the estate, but if he use it for any other, he is a trespasser. That was decided in Scott *v.* Bogle, 15 *F. C.* 397. The effect of this 80th section was to create in favour of the respondents a statutory servitude road over the railway of the appellants for the use of the adjoining lands, and no more.

[*Lord Cottenham.* — I understand the party limits his claim to going to lands of which he has got a lease.]

No. They carry it the full length expressed in the opinions of the Judges in the Court below; *vide* 2 *D. B.* and *M.* 1470. They say we are not entitled to object to the making of their railway, whatever use they may put it to.

[*Lord Brougham.* — You consider your railway as your property, not as an easement.]

Undoubtedly. We are as much the proprietors of the land on which it is formed as any other proprietor of any other land.

[*Lord Cottenham.* — Do you hold, that by "any ground "through which the said railway may pass," was confined to lands in the possession of the party at the time of the passing of the act? If a party at that time were lessee of lands on one side of the railway, and owner of lands on the other, would he be entitled to use the powers given by this 80th section?]

We are not prepared to say, but perhaps, if necessary to answer such a case, should answer it in the affirmative; for what was intended was to give parties such reasonable enjoyment of their lands as should be consistent with the use of the railway.

[*Lord Cottenham.* — The question is not raised by the petition as to the use sought by the respondents being to make a railway to any where, but merely to particular lands, of which they are lessees.]

But when you have passed the principle sanctioned by the statute, it is difficult to restrain the argument.

[*Lord Brougham.* — The interdict prayed by you is against making a railway beyond respondents' lands.]

Perhaps so; but the true effect is to prohibit them making a railway within their own lands to communicate with others.

[*Lord Cottenham.* — If you were to get your interdict in the terms you ask for it, you would get very little.

Lord Brougham. — You ask that they may be prohibited from doing a lawful act with an unlawful intention, but how do you know what the intention is?]

The prayer is against communicating with other lands.

[*Lord Cottenham.* — The prayer must be taken with reference to the preceding statement in the petition, and that treats the lands of Sir William Alexander as if the respondents had no interest in them.]

The Solicitor-General and Mr Anderson appeared for the respondents, but were not called upon.

LORD COTTENHAM. — My Lords, I think that the petition of the appellants must be dismissed, because the present complaint is upon the facts as they appear before us, that the defenders, who have the lands through which the railway originally passed, are now become lessees of the adjoining land; and unless the

appellants can make out that the object of this clause was only to protect land held as one estate at the time the original railroad was made, and which was divided by making that railroad, then the appellant's case fails; because what he asks is, that the party may be interdicted from making a railway crossing the main railway, communicating with the land which he now holds of Sir William Alexander. It appears to me, that this 80th clause cannot be confined to that estate, which was divided by the railway at the time the railway was made, because it is obviously intended for the convenience of those who may be occupiers, and from time to time occupiers of the land, partly on one side, and partly on the other side of the principal railway, and that without reference to the title under which it is held; the fact of the occupation of the two sides of the railway being that which entitles the party to the convenience and benefit of crossing it. There is nothing in the 80th clause confining it, and the justice of the case requires that it should not be confined. However the grounds may be stated in the reasons of the learned Judges, we are confined to that which, on the facts, is in contest between the parties; and confining myself to the case as it stands on the facts, I think the party is not entitled to the interdict on the facts he states in his petition, which are the only facts with which we have to deal. Therefore I move your Lordships that the interlocutor of the Court below be affirmed with costs.

Lord Brougham. — My Lords, I entirely agree with my noble and learned friend. I had some doubt at first whether this section meant the state of the property at the time the act passed, or generally, but that doubt is now removed. Certainly, there is one part of it which was not formerly so understood in the making of canals; for supposing one party to make a canal, and another party to have a right to dig a canal across it, would be most inconvenient; however, we cannot enter into that.

Lord Campbell. — The only question, it seems to me, is, whether

you are to confine the right given by the section to the state of the ground at the time the act passed or not. If you are to confine it to the state of the ground at the time the act passed, then the analogy would arise between the act and the intendment. If you are to read this as owner and occupier from time to time of any ground, and at all times thereafter, then the analogy fails; and it being allowed that these parties are the lessees of the adjoining ground, I think that ground is within the meaning of the section of the act of Parliament.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

DAVID CALDWELL — GRAHAME MONCRIEFF, & WEEMS, Agents.

[30*th May*, 1842.]

MISS JANE CARRICK, and Others, *Appellants.*

ROBERT C. BUCHANAN, Esq., *Respondent.*

Tailzie. — Terms of entail held not to impose fetters upon the institute against altering the order of succession.

Id. — Whether a gratuitous *mortis causa* deed by an institute, altering the order of succession prescribed by an entail, which, as to the institute, was defective in the irritant clause, is good against the substitutes. Remit for the opinion of the Court below.

ON 31st December, 1816, Robert Carrick executed an entail of his lands of Burnhead in favour of David Buchanan and others, one of the remote substitutes being Thomas Carrick, the institute in the deed next to be mentioned under the name of George Carrick, junior. On the 18th of July, 1820, Robert Carrick executed another entail of the lands "to and in favour "of George Carrick, junior, son of George Carrick residing at "Balmeno, and the heirs-male of the body of the said George "Carrick, junior, whom failing, to David Buchanan of Dum-"pellier, and the heirs-male of his body," whom failing, a series of substitutes; and bound himself to infeft "the said "George Carrick, junior, and the other heirs of tailzie above "named." The conditions of this entail were, *inter alia*, that "the said George Carrick, junior, and the whole heirs of "tailzie, and heirs whatsoever," should use the name of Carrick; that the wives and husbands of "the said George Carrick, junior, "and the whole heirs of tailzie," should be excluded from all right of terce or courtesy; that it should not be lawful to the "said George Carrick, junior, or any of the heirs of tailzie, and

" heirs whatsoever who shall succeed to my said lands and estate, " to alter, innovate, or change this present tailzie, or nomination " to be made by me, or order of succession therein prescribed, " or to do or grant any act or deed that may import or infer " any such alteration, innovation, or change, directly or indi- " rectly: 3dly, That it shall not be in the power of the said " George Carrick, junior, or any of the heirs of tailzie, and heirs " whatsoever, who shall succeed to my said lands and estate, to " sell, alienate, impignorate, dispone, dispose of, or transfer the " said lands and estate, or any part thereof, either irredeemably " or under reversion, or to burden the same in whole or in part, " with debts or sums of money, infeftments of annualrent, or any " other burden or servitude whatsoever, nor to contract debts, " or grant deeds whereby the said lands and estate may be evic- " ted from them, or the said lands and estate and heirs of tailzie " succeeding thereto may be anywise affected; declaring hereby, " that all such deeds so to be granted, or debts to be contracted, " in so far as the same may affect the foresaid lands and estate, " or heirs of tailzie succeeding thereto, shall be void and null, " and the said lands and estate shall noways be affected or bur- " dened therewith, or subjected or liable to be adjudged, or any " other way evicted, either in whole or in part, for, or by the " debts or deeds, legal or voluntary, contracted or granted by " the said George Carrick, junior, or any of the heirs of tailzie " and heirs whatsoever, who shall succeed to the said lands and " estate; and that whether such debts or deeds shall have been " contracted or done before or after their succession to, or ob- " taining possession of the said lands and estate: 4thly, That " it shall not be lawful to, nor in the power of the said George " Carrick, junior, or any of the heirs of tailzie and heirs what- " soever, who shall succeed to the said lands and estate, to set " tacks or rentals of the same, or any part thereof, for any longer " space than twenty-one years, and that without any diminution

" of the rental, or for any longer space than the lifetime of the
" setter, in case of a diminution of the rental; nor in case, or by
" any means, directly or indirectly, to take or accept of any
" grassum or entry-money for or on account of any such tack or
" set to be granted by them or any of them; declaring hereby,
" that all such tacks or sets as shall be granted contrary to these
" conditions shall be void and null; and these presents are also
" granted by me with and under the several irritancies following,
" viz., *First*, That in case any adjudications or other legal exe-
" cutions shall be obtained or used of or against the fee or pro-
" perty of the said lands or estate, or any part thereof, and that
" the said George Carrick, junior, or the heir in possession of
" the estate for the time, shall fail or neglect to redeem or purge
" the same timeously, and three years at least before expiry of
" the legal reversion thereof, then and in that case, he or she
" shall thereby forfeit and lose his or her right and title to the
" said lands and estate, and the same shall devolve to the next
" heir of tailzie who would succeed if the contravener were natu-
" rally dead, and the next heir shall have access to establish a
" right and title thereto in his or her person accordingly: *Se-
" condly*, That in case the said George Carrick, junior, or any
" of the heirs of tailzie and heirs whatsoever, who shall succeed
" to my said lands and estate, shall contravene any of the con-
" ditions, provisions, restrictions, limitations, and others herein
" contained, or to be contained in any writing hereafter to be
" executed by me, or any of them, that is, shall fail or neglect to
" observe, obey and perform the said several provisions and con-
" ditions, and every one of them, or shall act contrary to the
" prohibitions, restrictions and limitations, or any of them, con-
" tained in this deed of tailzie, or to be hereafter added and ap-
" pointed by me, (excepting as is herein after excepted,) that
" then, and in any of these cases, the person or persons so con-
" travening, by failing to obey the said conditions, or any of

"them, or acting contrary to the said conditions, provisions, "prohibitions, restrictions and limitations, or any of them, shall, "for him or herself only, *ipso facto* amit, lose and forfeit all "right, title and interest to the said lands and estate above "described, and the same shall become void and extinct, and my "said lands and estate shall accresce, devolve and belong to the "next heir-male general, or of tailzie appointed to succeed, al- "beit descended of the contravener's own body, in the same "manner as if the contravener were naturally dead; and upon "every such contravention, failure or neglect, it is hereby ex- "pressly provided and declared, that not only my said lands "and estate shall not be burdened or liable to the debts and "deeds of the several heirs of tailzie, and heirs whatsoever, as "before provided; but also all debts, deeds, and acts contracted, "granted, or done contrary to these conditions and restrictions, "or to the true intent and meaning of these presents, shall be "of no force, strength, or effect, and shall be ineffectual and "unavailable against the other heirs of tailzie and heirs whatso- "ever succeeding to my said lands and estate, and that the said "heirs, as well as the said lands and estate, shall noways be bur- "dened therewith, but shall be free therefrom, in the same man- "ner as if such debts, deeds, or acts had never been contracted, "granted, or done; and also it shall be free and lawful to every "heir who shall have a title by or through every contravention "of a former heir, though minor at the time, and whether de- "scended of the contravener's body or not, to sue for and obtain "declarators of irritancy of the contravener's right, and to serve "heir of the person who died last vest and seized in the said "lands and estate preceding the contravener, and thereby, or by "adjudication, or any other legal method, to establish in his or "her person the right and title of and to my said lands and "estate, in the terms hereof, without being subjected or liable to "the debts or deeds of the person or persons so contravening,

" and without regard to any alteration made or intended, acts " done, or deeds granted by the contravener, contrary to the " conditions and restrictions before written, or others to be ap- " pointed by me, but that the heir or heirs who shall obtain " possession of the said lands and estate, by virtue of declarators " of the irritancy of the contravener's right, and all the heirs of " tailzie and heirs whatsoever succeeding to them, shall be sub- " ject and liable to the same conditions, restrictions, and irritan- " cies through the whole course of succession for ever; and it is " hereby provided and declared, that every person contravening " and irritating his or her right, as aforesaid, shall be excluded " from the management of the said lands and estate, during the " pupillarity and minority of the next heir of tailzie succeeding, " though a descendant of his own body; and it shall be compe- " tent to any other person to obtain gifts of tutory-dative to such " next heir, or to him or her to elect and chuse curators, one or " more, for the management of the said lands and estate, exclu- " ding always the said contravener."

After making a variety of provisions, this entail contained the following clause: — " And whereas I resigned and conveyed the " said several lands and heritages herein before disponed, along " with sundry other lands, to and in favour of the foresaid David " Buchanan and others, by a deed of entail executed by me dated " the 31st of December 1816, I hereby, in virtue of the power " and faculty therein reserved to me, revoke that deed, in so far as " respects the said lands and heritages herein before disponed " allenarly, and to the effect of settling and disposing of these sub- " jects under this present deed of entail, but under the express " provision and declaration, that in case this deed shall be reduced " and annulled upon any legal ground, the said whole lands and " heritages hereby disponed shall revert, continue, and remain " under, and in terms of the said former deed of entail in " favour of the said David Buchanan and others, or any other

" deed to be executed by me in place thereof, in the same " terms and manner as if this present deed had not been " executed by me."

The maker of this entail died in 1821. The true name of the first disponee was Thomas Carrick, son of Thomas Carrick, instead of George Carrick, son of George Carrick. This was found by decree of declarator in an action to that effect, and thereafter, Thomas Carrick took infeftment under the entail, and entered into possession of the lands conveyed by it, and continued in such possession until his death, which occurred in May, 1836.

Thomas Carrick died without issue; and after his death, his law agent delivered to the appellants a deed which had been executed by him, upon the 22d October, 1835, whereby he sold, alienated, and disponed to and in favour of himself, and his heirs and assignees whomsoever, heritably and irredeemably, the whole entailed lands.

The respondent, on the 15th June, 1836, procured himself to be served heir of tailzie and provision to Thomas Carrick, and brought an action for reducing the disposition executed by him, as *ultra vires*, in contravention of the prohibitory, irritant, and resolutive clauses of the entail, and in defraud of the respondent, and the other heirs thereby called, and as being null under the act 1621, cap. 18.

Condescendence and answers were put in for the parties, with pleas in law. The pleas for the appellants were: —

" I. The irritant clause founded on by the pursuer, contained " in the deed of entail, is ineffectual against the deeds of the in- " stitute in the entail, as it only provides and declares, that upon " every contravention the entailer's said lands and estate shall " not be burdened or liable to the debts or deeds of the several " heirs of tailzie, and heirs whatsoever; and that such debts, " deeds, and acts, shall be of no force, strength, or effect, and

" shall be ineffectual and unavailing against the other heirs of " tailzie; but the deed contains no provision irritant of the debts, " deeds, or acts of the institute in the entail — the disposition " executed by him, therefore, is perfectly valid.

" II. Entails are *strictissimi juris*, and liable to rigorous inter- " pretation in favour of liberty, and against restriction without " regard to the intention of the entailer, unless it be expressed in " apt and accurate terms; and the entail founded on by the pur- " suer, not being fenced with an effectual irritant clause against " deeds by the institute, the present pursuer has no right to insist " in this reduction.

" III. The disposition and deed of entail libelled wus effectual " to convey the lands disponed to the disponee and institute; and " although he again exercised the right of disponing them to " himself, and his heirs and assignees, that first disposition and " deed of entail has not been reduced and annulled upon any " legal ground; and there is no room for the operation of the " clause of reversion to the former deed of entail of 1816, as con- " tended for by the pursuer."

The pleas for the respondent were: —

" I. The deed of entail, dated 18th July, 1820, under which " the late Thomas Carrick was infeft in the estate of Burnhead, " being in all respects valid and effectual, it was *ultra vires* of " the said Thomas Carrick to grant the disposition now under " reduction.

" II. The said disposition is null in terms of the statute 1621, " cap. 18.

" III. Even supposing that the said entail, dated 18th July, " 1820, were held to be null and defective, the estate of Burn- " head now in question would not be carried by the disposition " under reduction, but would revert, continue, remain under, " and be carried by the former deed of entail, executed by the " late Robert Carrick, on the 31st December, 1816."

Cases were ordered by the Lord Ordinary, (Cunningham,) upon advising which his Lordship pronounced the following interlocutor, adding the subjoined note: — "11*th July*, "1837.—The Lord Ordinary having considered the record, "revised cases, and the whole process, finds that the disposition "under reduction, executed by the late Thomas Carrick, "on 9th October, 1835, falls under the prohibitory, reso- "lutive, and irritant clauses of the deed of entail executed by "the deceased Robert Carrick, Esquire, in favour of the said "Thomas Carrick, under which the latter succeeded to, and "possessed the estate libelled on, from the period of the entailer's "death in 1821, till his own death in 1836: Therefore reduces, "decerns, and declares, in terms of the libel: Finds expenses "due to neither party, and decerns."

"*Note.* — This is a reduction of a settlement on the ground that "the maker was restrained, by a strict tailzie under which he took "up and possessed the lands, from alienating or altering the order of "succession.

"The plea of the defender is founded on the supposed imperfection "of the irritant clause in the original tailzie, which is said to be "directed only against the acts and deeds of heirs, and not against "those of the institute. But it appears to be impossible to read the "various members of the clause in question, and to hold it of the "limited nature thus contended for.

"On the contrary, the irritant clause in question seems to be un- "usually full and comprehensive, almost to a degree of redundancy. "It consists of different sections, one or other of which renders void "every possible act of any party taking up the estate under the "tailzie. Thus, (1.) it commences with declaring, that 'upon every "'such contravention,' (which referred specially to the possible "contravention of the institute,) 'not only my lands and estate shall "'not be burdened or liable to the debts and deeds of the several "'heirs of tailzie, and heirs whatsoever, as before provided.' After "which the clause proceeds with this proviso, (2.) 'but also all debts, "'deeds and acts contracted, granted, or done contrary to these

" ' conditions and restrictions, or to the true intent and meaning of " ' these presents, shall be of no force, strength, or effect;' and, (3.) " ' shall be ineffectual and unavailable against the other heirs of " ' tailzie, and heirs whatsoever, succeeding to my said lands and " ' estate; and that the said heirs, as well as the said lands and " ' estate, shall nowise be burdened therewith, but shall be free " ' therefrom,' &c. &c.

" It would, it is thought, be denying effect, not only to the obvious " meaning of the entailer, but to the most express words used in the " last members of the clause, not to hold them as reaching acts of " contravention by the institute.

" But even if the irritant clause were held defective, the Lord " Ordinary has great doubt if the settlement under reduction could " be supported. It will be observed, that this was to all intents a " *mortis causa* deed: For it is admitted on record, (see Answers to " article 9th,) that it never was delivered during Thomas Carriek's " life, and no onerous cause is instructed, or even averred.

" The present case, therefore, even if the irritant clause were de- " fective, would fall within a class noticed by all the institutional " writers on Scots law, of a destination fortified by a prohibitory " clause; and it would deserve mature consideration whether such a " destination could be altered by a *mortis causa* deed executed by " one of the heirs, and not delivered, and not to take effect till his " death.

" Both Lord Stair, (B. II., tit. 3, sec. 59,) and Mr Erskine, (B. III. " tit. 8. sec. 23,) lay it down that such a destination cannot be altered " gratuitously; and the same doctrine is said to have been recognized " in one of the branches of the Roxburgh cause, when Lord Eldon " was Chancellor.

" No doubt the older authorities on this question may be supposed " shaken by the latter cases of Hoddam and Speid, in which it was " found that heirs possessing under entails with defective irritant " clauses might make even gratuitous alienations. Still the gratuitous " alienations found competent in these cases, appear only to have been " donations *bona fide* made by deeds *inter vivos*. There has been no " case, as yet, reversing the doctrine laid down by all the authorities

" in our law for upwards of a century, and declaring that a substitu-
" tion fenced with a prohibitory clause can be gratuitously altered by
" one of the heirs in a *mortis causa* deed. This, however, is the
" nature of the deed under reduction in the present case.

" As this last point will come under consideration of the Court in
" considering a question on the Strathbrock entail, lately decided by
" the Lord Ordinary, the two cases should be brought before the
" Inner-House at the same time."

The appellants presented a reclaiming note to the First Division of the Court, praying their Lordships to alter the Lord Ordinary's interlocutor, to assoilzie the appellants, and find them entitled to expenses. The respondent also presented a reclaiming note, in which he prayed the Court, " in addition to the " reason of reduction adopted in the said interlocutor, to find " that, under all the circumstances in which it was granted, and " particularly in its being gratuitous, the disposition dated 9th " October, 1835, is also liable to reduction under the Act 1621, " chap. 18, and generally to sustain the whole reasons of reduc-" tion set forth in the summons, and insisted in by the pursuer, " and farther, to find the pursuer entitled to his expenses."

On advising the reclaiming note for the appellants, the Court pronounced the following interlocutor: — " The Lords " having resumed consideration of this reclaiming note, and " heard counsel for the parties, adhere to the interlocutor re-" claimed against, and refuse the desire of the reclaiming note; " of new, find no expenses due to either party, and decern."

The Court on the same day, on advising the reclaiming note for the respondent, pronounced the following interlocutor: — " The Lords having resumed consideration of this reclaiming " note, and heard counsel for the parties, adhere to the inter-" locutor reclaimed against, and refuse the desire of the reclaim-" ing note; of new, find no expenses due to either party, and " decern."

The appeal was against the two first of these interlocutors, and the last, in so far as it found expenses due to neither party. The respondent took no cross appeal.

Mr Solicitor General, and Mr Anderson, for appellants. — I. The institute is mentioned by name in the prohibitory and resolutive clauses, but he is omitted in the irritant clause, which is confined to the heirs of tailzie and heirs whatsoever. But it is said, that the declaration subjoined to the prohibition against selling or burdening with debt, amounts to an irritant clause. But each clause has its particular and defined object, and the House cannot, where one is defective, look to another to aid it or supply its place. Morehead *v.* Morehead, 1 *S.* and *M'L.* 29; there Lord Brougham said, "The third rule is, where there are "two different parts of an instrument, and mention is made in "them both of the same matter, we are rather to seek the inten- "tion of the maker in that part whose proper office it is to deal "with that matter, than in the other part, where it occurs inci- "dentally." But assuming the words following "declaring," capable of being used as the irritant clause, it is confined to "deeds to be granted or debts to be contracted," it is not directed against either selling or altering the order of succession. In Lang *v.* Lang, 1 *M'L.* and *Rob.* 871, in which judgment was given before that now complained of, Lord Brougham laid down, that the irritancy must be levelled at the particular act, it was not sufficient that it should be levelled at it as a conveyance or implication.

[*Lord Brougham.* — In that case there were these words, "or "the hopes of succession evaded," which were very important.]

Then, if the proper irritant clause be looked to, it is evident, from the terms used, that the institute is not expressly included.

[*Lord Brougham.* — You are seeking to set free the institute, by implication, from the word "other."]

We are not seeking to set him free, we do not find him bound. In Breadalbane *v.* Campbell, 2 *Rob.* 109, the term "other" was used exactly as here, and there the Court below, after the decision of this case, held that the entail did not affect the institute. Here the institute is neither named nor described, and the intention of the maker seems rather that he should not be bound, where he says, that it shall be lawful to "every heir," who shall have title through the contravention of "a former heir," to sue declarator of irritancy; but, though competent to speculate as to inference of intention in regard to freedom from the fetters, there can be no speculation as to the intention to bind: that must be plain and inevitable from the words used, otherwise the party, whether institute or heir, is free.

[*Lord Chancellor.*—The words here are, "upon every *such* "contravention," but, in Breadalbane *v.* Campbell, the words were, "upon every contravention." In that case, you could not get out of the limited construction; here the institute is named in the contraventions to which "such" is the relative. There seems a distinction.

Lord Brougham.—In Breadalbane's case it was every contravention generally by heirs, without mention of the institute.]

The question is not, whether the clause *may*, but, whether it *must*, include the institute; if it be conceded, as it must, that an institute is not included under the word "heirs," the clause is against heirs only.

II. As to the plea founded on the act 1621, there is no averment of insolvency upon which to found it, and, without insolvency, the statute has no application to the case, and any notion of a distinction of cases occurring, *inter haeredes*, from those between third parties, in regard to the construction of entails as affected by this statute, cannot seriously be maintained, as all the most important questions upon this branch of the law have occurred between heirs.

Mr Pemberton, and Mr James Bruce, for respondents. — I. The deed in this case is *mortis causa*, and, at the granter's death, remained undelivered. At the time this case was decided in the Court below, it was supposed that there had been a decision of this House in the Hoddam case, that an entail could not be defeated by a gratuitous deed of this nature.

[*Lord Campbell.* — That question is touched by the Lord Ordinary, but not by the Court.]

No. Because of the supposed judgment in the Hoddam case, but there never was any such judgment.

[*Lord Brougham.* — That point was not raised in the case.]

Certainly not. On the contrary, your Lordships distinctly repudiated any intention of meddling with it. The act 1685 left questions *inter haeredes* untouched, and it is laid down, both by *Stair*, II. 3, 59; and *Ersk.* III. 8, 23, that the destination of an entail cannot be altered gratuitously; that was decided in Callender *v.* Hamilton, *Mor.* 15476; so in Ure *v.* Crawford, *Mor.* 4315; and in Cathcart *v.* Cathcart, 5 *Wil.* and *Sh.* 315, the Lord Chancellor said, "That the Ascog case would support a *bona* "*fide* lender leading adjudication, if there were no effectual pro- "hibitory clause, but that the transaction being with Kennedy, "which is another name for Sir Andrew Cathcart himself, the "thing is all moonshine."

While that error in the Hoddam case remained unexplained, the Judges in Scotland were under the impression, that the law had been shaken, and Speed *v.* Speed was decided under the impression of the same mistake, *Sandford*, p. 103.

The Lord Ordinary's judgment in the present case, and that of the Inner House, were both given previous to the explanation of this mistake in the Hoddam case.

[*Lord Campbell.* — Is any distinction made between deeds *inter vivos* and *mortis causa*?]

We are not aware, but there is a clear distinction as to the

cases with creditors from those with heirs. The validity of the entail, in the first class, depends on the statute, while, in the second, it is wholly independent of the statute, and rested entirely on the conditions. It may be very true, that the cases have occurred with heirs, seeking to void the entail by a prospective act, which, if effectual for that purpose, was indifferent to them in other respects, as in the Hoddam case, where the heir attempted to ascertain a power to burden or sell; but here the act of contravention is accomplished, and, in its nature, is purely gratuitous.

II. As to the irritant clause. The resolutive clause sets out with declaring, that in the case, the institute, George Carrick, junior, by name, or any of the heirs, should commit certain acts of contravention, they should lose their right, and then the irritant commences in these words, "and upon every *such* contra-"vention;" the word "such," here, is the relative to the various contraventions which precede it, and as these are contraventions to be done by the institute, among others, it is impossible to say, that the acts of the institute are not irritated. But, admitting this to be erroneous, the words which follow, "but also all debts, "deeds," &c., is a sufficient independent clause to embrace all acts done, whether by the institute or the heirs; it is limited neither to the one nor the other.

[*Lord Brougham.*— You say that the second branch, commencing with, "but also," &c., is sufficient without the first?]

Precisely.

[*Lord Chancellor.*— What you have to struggle against is the word "other?"]

Undoubtedly. But it is obvious that that word was introduced to make the clause embrace acts done by the heirs; for without it, and had the clause stood, "against the heirs," only, it would have applied to the acts of the institute alone, but by the introduction of the word "other," the acts of heirs, as well as of the institute, are irritated.

There the irritant clause was not co-extensive with the resolutive, and the question was, whether you could go back to the resolutive clause, because, continuously and grammatically, both were one sentence, and the institute was mentioned in the resolutive clause, distinct from the heirs, while, in the irritant clause, he was omitted altogether.

Mr Solicitor General, in reply.—If the principles be looked to, it is quite inconsistent with all the rules of law that there should be a different rule of construction of entails *inter haeredes*, and as with creditors. It is said, that the statute 1685 creates the difference, but the statute in no part requires one set of clauses against heirs, and another against creditors.

[*Lord Campbell.*—What they say is, that the entail before the statute, and now without the statute, is good against heirs, though it do not have an irritant clause.]

The argument seems to lead to this, that the heirs may have an interdict against the heir in possession, to prevent him from disposing of the estate, but no case has been shewn making any distinction between heirs and creditors. *Ersk.* III. 8, 23, no doubt says, that the heirs are creditors under the prohibitions, and may set aside gratuitous deeds on the statute 1621. Without inquiring whether this character given to the heirs is consistent with the authorities, it is sufficient that we are not in that question. It is not pretended that the maker of this deed was in insolvent circumstances, without which the statute cannot have application. But this question was settled by the Ascog case, and the other decisions, since *Erskine* wrote. In the Duntreath case, *Mor.* 4409, the distinction between heirs and creditors was expressly taken and disallowed; and in Lang *v.* Lang, the question was between heirs.

[*Lord Campbell.*—Was the distinction taken there?]

I don't know. So Speed *v.* Speed was a case with heirs, and the question was, whether the heir "might gratuitously alienate." And the common form of declarator is, to have it found that the

party has an absolute right to the estate. In Sharpe *v.* Sharpe it is said there was some mistake in drawing up the order, but it was in conformity with the conclusions of the summons, and no attempt was ever made to have the supposed error corrected.

The position taken by the heirs in the Ascog case, as to reinvestment, was a fair deduction from *Erskine's* notion, as to the substitutes being creditors. Lord Cringletie, in his judgment, expressly met the distinction, and that opinion was approved of by this House, and the interlocutor of the majority reversed. If the distinction now raised is to be adopted, the opinions delivered in this House, in the Ascog case, cannot stand. In Cathcart *v.* Cathcart the question at issue was, whether the heir, by colourably contracting debt, contracting debt not being prohibited, could evade a prohibition against selling; but that has no application to the present case.

[*Lord Campbell.* — The great principle in the Ascog and Tillycoultry cases was the absurdity of reinvestment *totis quoties.*]

The absurdity might be observed upon, but it could not form any principle of decision.

[*Lord Chancellor.* — Lord Eldon's decision rested principally upon that absurdity. I remember it well.]

It was hardly possible to refrain from remarking upon so apparent an absurdity, but it could hardly be the principle of his judgment. I submit the law of entail is to be governed entirely by the act 1685, and, if the deed is not valid under that statute, it is not good against either heirs of entail or any one else.

LORD CHANCELLOR. — Since the beginning of the argument, I have been endeavouring to discover how the irritant clause could be made to affect the institute, but I have not been able to do so. I am of opinion, therefore, against the judgment both of the Lord Ordinary, and the judges of the inner Court. I think the other point has never been expressly decided by this House — never satisfactorily decided. That question has not been consi-

dered by the Court below, and I think it ought to go back for that purpose.

Lord Brougham. — Their Lordships seem never to have touched it in their view of the case.

Lord Chancellor. — It strikes me so. They appear to have been so strong in their opinion with the Lord Ordinary, on one point, that they did not at all enter into the consideration of the other point, stated in the judgment of the Lord Ordinary.

Lord Brougham. — In fact, it did not arise.

Lord Chancellor. — We cannot decide that question in the first instance, whatever impression we may have on the argument of the Solicitor General.

Lord Brougham. — They ought to take a consultation of the judges on it, it is a question of great importance.

Lord Chancellor. — Unless it was a question absolutely free from all doubt, not having been presented to the Court below, we are bound to send it back after the doubts expressed by Lord Cunningham, with respect to it. It is not for us to decide it in the first instance.

Mr Solicitor General. — Then it would be a remit on that point. May I suggest on the part of the clients, for whom I appear, who are the heirs-portioners of the institute under that entail, that it is rather hard these costs should fall on them personally; probably your Lordships will be of opinion, that the costs of this remit should be paid out of the estate under the circumstances.

Lord Chancellor. — When the case comes back we will decide that. It is a question of so much importance, and the judgment of the Lord Ordinary, and that of the other learned persons, is so strongly expressed, that it would be the better way to reserve the judgment as to the titles to the estates.

Mr Solicitor General. — The question of the costs of the remit will be reserved?

Lord Chancellor. — Yes, we merely say nothing about them.

It is not to be understood, Mr Solicitor General, that in point of form, we have decided. We remit the case generally, with the view of having the judgment of the Court on the point to which I have referred; it is not to be considered that we have decided any thing farther than directing the remit.

Mr Solicitor General. — Might not that rather prevent your Lordships' object? Would not the object be, that the Court below should come to a decision on the subject of the gratuitous deed?

Lord Chancellor. — Merely as to that. In point of form, we pronounce no judgment on the other parts at present.

Lord Campbell. — I apprehend that question will be specially submitted to the Court below.

It is Ordered, That the cause be remitted back to the First Division of the Court of Session, in Scotland, with directions to consider, "whether, if the irritant clause in the deed of entail, in the said cause mentioned, should be held defective as not being directed against the institute, the said deed of entail is otherwise sufficient to exclude or render void the disposition under reduction, on the ground of its being, as alleged by the respondent, a gratuitous deed;" and to take the opinions of the Judges of the Second Division of the said Court, and of the permanent Lords Ordinary thereof, upon the question; and to report the opinions of the whole Judges, including the Lords Ordinary, thereupon to this House. And this House does not think fit to pronounce any judgment upon the said appeal until after such opinions shall have been so reported, according to the direction of this order.

DEANS and DUNLOP — RICHARDSON and CONNELL, Agents.

(10*th June*, 1842.)

EUPHEMIA KERR, *Appellant.*

WILLIAM KEITH, Trustee on the sequestrated estate of Archibald Cochran, and ALEXANDER COCHRAN and his Curator Bonis, *Respondents.*

Tailzie.—Real and Personal.—Legacies bequeathed by an entailer, held not to have been given in terms which made them burdens on the entailed lands, for which the lands could be adjudged, but so only as to make them payable by the heirs of entail, as they should successively come into possession of the lands.

Bankrupt.— Sequestration.— Competition. — Found, that the trustee with completed titles under a sequestration of an heir of entail's estates, had right to the rents preferably to a legatee, the payment of whose legacy was by the entailer made a condition of the heir's holding the lands.

Appeal. — Found, that appeal against an interlocutor, which finally disposed of an action as regarded one of several parties, could competently be brought when the whole case was brought up, though at that time more than two years had expired from the date of the interlocutor affecting the single party.

ON the 3d August, 1809, Cochran executed an entail of his lands of Ashkirk, in the county of Roxburgh, by a deed whereby, on this narrative, " considering that I have settled my lands and " estates, lying in the county of Edinburgh, under entail, devised " to myself in liferent, and to my only son, Archibald Cochran, in " fee, and the heirs and substitutes therein named, and that for " certain grave and proper considerations, I have resolved to " settle my lands and estate of Ashkirk, after described, in " manner, and under the conditions and limitations after written,"

he disponed the lands to his only son, Archibald Cochran, and the heirs whatsoever of his body, and a series of substitutes, which, in the outset, embraced his daughters and their children, " but with and under the conditions," &c. " after written." One of these conditions was in these terms: — " As also, that it " shall not be lawful to, nor in the power of, the said Archibald " Cochran, my son, nor any of the heirs or substitutes aforesaid, " succeeding to the said lands and estate, to sell, alienate, " impignorate, or dispone the same, or any part or portion " thereof, either irredeemably or under reversion; nor to grant " infeftments of annualrent, mortgages, nor any other right or " security whatever, redeemable or irredeemable; nor to contract " debts; nor suffer, or allow, the superior's duties, or any other " burdens legally chargeable on the premises, to run on unsatis- " fied; nor to do any other act or deed, civil or criminal, " treasonable or otherwise, whereby the same, or any part " thereof, may, or can, be apprised, adjudged, evicted, or " forfeited; nor to vary or alter this present tailzie, or order of " succession, in any shape or manner; nor to do any other act " or deed, of whatever nature, whereby the same might be any- " ways affected, frustrated, or infringed, contrary to the true " meaning, purport, and intendment hereof."

On the same day Cochran executed another deed of entail, of lands in the county of Edinburgh, in favour of his son Archibald, and the heirs whatsoever of his body, and a series of substitutes, embracing, as in the other deed, his daughters and their children, but in an order different from that prescribed by the first deed. The recital of the deed was in these terms: — " Considering that " I have settled my lands and estate of Ashkirk, lying in the " county of Roxburgh, under entail, devised to myself in liferent, " and Archibald Cochran, my only son, in fee, and the heirs and " substitutes therein mentioned; and that, for certain grave and " proper considerations, I have resolved to settle my lands and

" estate after described, in manner, and under the conditions and " limitations after written." The deed contained a condition in the same terms with that which has been quoted from the other deed.

On the same day Cochran executed a deed of settlement, which contained this recital: — " I, Archibald Cochran, Esquire " of Ashkirk, whereas I have settled and devised my estate of " Ashkirk, in the shire of Roxburgh, and certain other lands " and estate, lying in the county of Edinburgh and Haddington, " upon Archibald Cochran, my only son, in fee, and the heirs of " his body; whom failing, the other heirs and substitutes, in the " order, and under the limitations of entail, specified in two " separate deeds, duly executed by me, of the date of these pre- " sents; and whereas I have, by three separate settlements, dis- " poned certain subjects in Musselburgh, therein mentioned, to " each of my daughters, Euphan and Jean, and to Marion, my " youngest daughter, since deceased, and their issue as therein " mentioned, and to which reference is hereby made; and " whereas I formerly advanced and paid certain sums of money, " as the patrimonies of my daughters, Margaret Cochran, on " occasion of her marriage with Mr William Kerr; of my " daughter Euphan, on her marriage with Mr John Johnston; " and of my daughter Jean, on her marriage with Mr Thomas " Brown: And having it now in contemplation, (in consequence " of the decease of Marion, my youngest daughter,) to make " certain additional provisions on my grandchildren, by Mrs " Kerr, and on my two surviving daughters, Euphan and Jean; " and considering, farther, that it is my meaning and intention, " that the said Archibald Cochran, my only son, if he survives " me, shall be my residuary legatee, after discharging my debts, " legacies, and provisions, have therefore resolved to make a final " settlement of my affairs, in manner underwritten; but with " reference to, and in confirmation of, my settlement before " mentioned, and with reference, and pursuant to that resolution."

The maker then disponed to his son, and the heirs whatsoever of his body; whom failing, to the said Euphan and Jean Cochran, equally between them, and the longest liver, in liferent allenarly; whom failing, to the children of his daughters, according to an order differing from that in either of the other deeds, his lands of Gilston and Overbrotherstones, "As also all and sundry "lands, tenements, and other heritages, presently belonging to "me, or that shall happen to belong to me at the time of my "death, other than those now settled under the aforesaid two "dispositions of entail, and the three separate dispositions, in "favour of my said daughters before referred to; as also, all "and sundry debts and sums of money, real and personal, and "however due or secured;" and his whole personal estate at his decease, "Declaring, that these presents are granted, with and "under this condition and provision, that it shall not be lawful, "nor in the power of the said Archibald Cochran, my son, nor "of the heirs of his body, nor of any of the heirs and substitutes "before mentioned, succeeding to the aforesaid lands and estate "of Gilston and Overbrotherstones, in virtue hereof, to sell, "alienate, or dispose of the same, or any part or portion thereof, "gratuitously, nor, in that manner, to alter the order or course "of succession, hereby prescribed, in regard to that estate; and "also with and under the burden of the payment of all my just "and lawful debts, and funeral charges; and also, with and "under the burden of the payment of the following additional "provisions to my grandchildren, by Mrs Kerr, and my said "children, Euphemia and Jean, viz., to Robert, William, "Euphemia, and Jean Kerr, my grandchildren, by my said "daughter Margaret, now deceased, to each of these four the "sum of L.400 sterling of principal money, and to Archibald "Kerr, also my grandchild, by my said daughter Margaret, the "sum of L.500 of principal money, and that at the first term of "Whitsunday or Martinmas that shall occur at the distance of

" twelve months from the first of these terms after my death, as " an additional provision or patrimony to each of them, over and " above what they may be entitled to by their mother's contract " of marriage, from their father's estate."

A subsequent clause of this settlement was expressed in these terms: — " And in order to render this present settlement the " more effectual, and in confirmation also of my tailzies, and " other settlements aforesaid, I do hereby nominate and appoint " the said Archibald Cochran, my son, and the heirs of his " body; whom failing, the other heirs and substitutes before " mentioned, in the order aforesaid, to be the sole executors of " this my last will and settlement, with full power to take pos- " session, confirm, and administrate, according to law, and in " terms hereof; but with and under the burden of the payment " of my debts, provisions, legacies, and others before and after " mentioned, and under the qualities and conditions thereto " annexed: And whereas, by contract of marriage entered into " betwixt the said Archibald Cochran, my son, with my concur- " rence, and Mrs Elizabeth Sommerville, his late wife, now " deceased, of date the 11th day of March, 1802 years, I " became bound to provide and secure the sum of L.6000 ster- " ling to the said Archibald and Elizabeth, in joint fee and life- " rent; but in security only to her of the life annuity thereby " assured to her, in the event of her surviving him, and to the " issue of the marriage, in fee, under the regulations therein " specified; and, *inter alia*, if there should be but one child, a " daughter, procreated thereof, the said provision should be, and " is thereby restricted to L.4000 sterling, payable at such times, " and in such proportions as the father should deem proper, and " appoint; but in default of such appointment, to be payable in " manner stipulated by the said contract, to which reference is " hereby made: And whereas, by the predecease of the said " Elizabeth Sommerville, leaving only one child of said marriage,

" a daughter, namely, Miss Robina Cochran, she will eventually " be entitled to the fee of the said restricted provision, in case " she should prefer the same to the more ample provision and " rights of succession which may eventually open to her, and " which, if accepted of by her, will preclude her claims, under the " said contract: And whereas the estate and funds, real and " personal, hereby settled by me on my said son, in fee-simple, " may be nearly adequate to the special burdens with which the " same stand charged, as well as the foresaid restricted provi- " sion, therefore my said son, by accepting hereof, or my entailed " estates, in terms of the settlements thereof, and the heirs suc- " ceeding to him therein, stand pledged and engaged, as afore- " said, to satisfy and procure discharges and extinctions of every " debt and obligation, provision and bequest of every description, " created or contracted by, or incumbent on me, and that in " such habile, proper, and effectual manner, as that the same " shall hereafter cease to exist, or afford action or execution " against my entailed estates: And whereas I deem it expe- " dient, for the purposes after mentioned, that after my decease, " a sum, not exceeding L.500 per annum, shall be set apart " from the rents and revenues of the estate of Ashkirk, and " stocked out at interest until a capital shall, by progressive " accumulation, be raised therefrom, to the amount of L.6000, " the capital originally assured to him, under the aforesaid con- " tract of marriage, subject to the regulations therein mentioned; " and I, accordingly, direct and enjoin the same to be so done, " at the sight of the trustees after mentioned, namely, William " Kerr, John Johnston, and Thomas Brown, my sons-in-law, or " the survivors or survivor of them, who are hereby authorized " and empowered to demand and recover such sum annually, " not exceeding that before specified, from the rents of the said " estate of Ashkirk, as they shall deem necessary, until the " aforesaid capital shall be raised therefrom, or by anticipation

" by larger advances, to that end and purpose, being voluntarily " made by the said Archibald Cochran, my son, or the heirs " succeeding to him; and to see the same laid out on proper " securities, these being always taken and devised to him in life- " rent, and also to him and his heirs and assignees in fee; but " in trust, for the purposes in the different events after specified, " viz., First, In the event of the said Robina Cochran, his " daughter, being excluded from the succession to the said " entailed estates of Ashkirk and Musselburgh, by an heir-male " of his body, for payment to her of the aforesaid restricted pro- " vision of L.4000 sterling, in terms of her mother's contract of " marriage, the surplus or remainder of the said capital being, " in such case, at his absolute disposal: But in the event of her " succeeding to the said entailed estates, in default of heirs-male " of his body, then, and in such case, she shall have no claim to " that provision, but that the same shall, together with the sur- " plus of the said L.6000 sterling, belong to, and be at the ab- " solute disposal of, her father, and she shall, accordingly, be " bound to make up titles under her mother's contract to the " said special provision, and convey the same to him and his " disponees, as a debt affecting the aforesaid fund, but not the " entailed estate."

By two subsequent codicils Cochran gave additional provisions to his grandchildren; the first of them containing a bequest of L.100, and the second of L.200, to his granddaughter, Euphan Kerr. The form in which these bequests were given by the first codicil was thus: — " I hereby oblige my heir to pay the follow- " ing sums;" and by the second, " hereby binds the heir suc- " ceeding to him to pay," &c.

The maker of these various deeds died in April, 1812, leaving them unrevoked, and funds covered by the general disposition more than sufficient for payment of his debts and legacies. His son Archibald entered into possession of his whole real and per-

sonal estates, and continued in the enjoyment of them until 1821. In that year Archibald became bankrupt, without having paid the legacies bequeathed by his father to the appellant. His estates were sequestrated under the bankrupt act, and by disposition, dated in January, 1822, he conveyed his whole sequestrated estate to Paterson, the trustee under the sequestration, by a disposition which conveyed "all and sundry the lands and "heritages after mentioned, which are contained in a deed of "entail executed by the deceased Archibald Cochran, sometime "of Ashkirk, my father, dated the 3d day of August, 1809, "and recorded in the register of tailzies, at Edinburgh, the "23d day of May, 1812, viz. All and whole," &c. "together "with all right, title, interest, property, or possession which I "have, or can pretend, to the several lands and other heritages "before described, or to any part or portion thereof, in time "coming: But declaring always, as it is hereby expressly pro-"vided and declared, that these presents are granted to the said "David Paterson, and his foresaids, solely for the purpose of "enabling him and them to uplift the rents, maills and duties, "kains, customs, and casualties of the said lands and others, "which are held by me, under the foresaid deed of entail, during "all the days and years of my natural life, and for the purpose "of giving him and them the right of working, carrying off, "selling and disposing of the coal and other minerals within the "said lands, cutting and selling the timber growing thereon, "and of granting leases of the said lands and heritages, but "without taking grassums, and of exercising every other act of "property thereon, as fully and freely in every respect as I, or "any other heir of entail of the said estate, could do, but no "farther; and shall noways authorize or entitle him or them to "sell or dispose of the said lands and heritages, or any part "thereof, or to contract debt thereupon, or to do any other act "or deed contrary to the terms and conditions of the said deed

" of entail and titles under which I possess or have possessed the " said lands and heritages."

Shortly after the bankruptcy the appellant brought an action of constitution of her three several provisions of L.400, L.100, and L.200, with interest from Whitsunday 1814, and, in July, 1827, she obtained decree in terms of her libel, which was qualified by a finding, " that the pursuer, on receiving payment of the said " principal sums and interest, or a dividend thereon from the " sequestrated estate of the said Archibald Cochran, was bound " to assign the same, or such part thereof as should be paid, to " the person paying the same; such assignation, in the event of " a partial payment only, not interfering with the pursuer's right " to recover from the entailed estate of the said Archibald " Cochran, or otherwise, payment of any balance of principal " and interest which should remain unpaid." Under this decree she was ranked upon the bankrupt's estate, and drew a dividend of L.119, 3s. 1d., or 2s. 6d. per pound.

In 1832 the appellant brought an action against Archibald Cochran, and the respondent Keith, who had succeeded Paterson as trustee on his estate, setting forth what has been detailed, and concluding, that it should be declared, " that the foresaid " provisions bequeathed to, and settled upon, the pursuer, with " the legal interest of the same, all as fixed and ascertained by " the foresaid decree of constitution, under deduction always " of the said dividends, or other sums received in part payment " and satisfaction of the same, form a burden on the said fee of " the entailed estates, and rents and proceeds of the same, or at " least the said entailed estates, and the rents and proceeds of " the same, are liable for the pursuer's provisions, as aforesaid; " and that the pursuer, in payment and security of her said " provisions and legal interest thereof, is entitled to institute and " follow forth, against the fee of the said entailed estates, and the " rents, profits, and duties of the same, all manner of real dili-

"gence, competent by law against real property, for payment or "security of debt; and in particular, that the pursuer is entitled "to lead adjudication against the said entailed estates, for the "said provisions, principal, interest, and penalty, under deduc- "tion aforesaid: Or, at least, it ought and should be found and "declared, by decree foresaid, that the said Archibald Cochran, "and the said substitute heirs of entail, in their order, as they "may successively succeed to, and take possession of, the said "entailed estates, are bound and obliged, as the condition of "holding the said entailed estates, and drawing the rents and "proceeds of the same, for and according to their respective "rights and interests, to satisfy and pay the foresaid provisions, "bequeathed to, and settled upon, the pursuer, with the legal "interest of the same, as fixed and ascertained by the foresaid "decree of constitution, under deduction always as aforesaid; "and it ought farther to be found and declared, that the said "William Keith, as trustee on the sequestrated estate of the said "Archibald Cochran, and the creditors whom he represents, are "not entitled to take any benefit or advantage from, or to draw "in payment of their debts, any part of the proceeds of the said "entailed estates, without making payment of the said provisions "bequeathed to, and settled upon, the pursuer, with legal interest "as aforesaid: And the same being so found and declared, the "said Archibald Cochran, and the said William Keith, ought "and should be decerned and ordained, to rank and prefer the "pursuer, *primo loco*, upon the rents and proceeds that have been "already drawn, or that hereafter may be drawn, from the said "entailed estates, until such time as her said provisions, and legal "interest of the same, fixed and ascertained as aforesaid, shall be "fully paid and discharged." The substitute heirs of entail were called as defenders to this action.

Separate defences were put in for the respondents. Keith, in his defences, pleaded: —

" I. The pursuer stands in no better situation than an ordi-
" dinary creditor of the bankrupt, and neither at common law,
" nor by the conception of the various deeds of settlement exe-
" cuted by Mr Cochran, senior, is entitled to adjudge the en-
" tailed estates, or in any way, direct or indirect, to maintain, to
" any extent, a preference out of the rents and proceeds thereof.

" II. The heirs of entail are not bound to make payment of
" the provisions and legacies left by Mr Cochran, as a condition
" of their right to the rents and proceeds of the entailed estates.

" III. The right vested in the defender, as trustee for the
" whole creditors, to the life interest of the bankrupt in the en-
" tailed estates, is preferable to any right which the pursuer, by
" adjudication or otherwise, can possibly acquire.

" IV. The pursuer must, at all events, assign over to the
" defender, for behoof of the creditors, the security she may, by
" adjudication or otherwise, be entitled to acquire over the
" entailed properties, or the rents and annual proceeds thereof."

Alexander Cochran, the first substitute of entail, in his defences, pleaded:—

" I. The pursuer's provision not being created or declared a
" real burden upon the entailed estate, either by the deed of
" entail itself, or by the general disposition and settlement, it is
" incompetent for the pursuer to have it found and declared that
" she can adjudge the fee of the entailed estate, for payment of
" her said provision.

" II. There is no declaration, either in the deed of entail, or
" in the general disposition and settlement founded on, which
" effectually imposes upon the heirs of entail, by their succeed-
" ing to, and taking possession of the entailed estates, an obliga-
" tion to pay the pursuer's legacy."

After closing the record upon the summons and defences, the Lord Ordinary (M'Kenzie) ordered cases, and upon advising these, he pronounced the following interlocutor upon the 13th

May, 1834: — "Finds, that the three deeds executed by the "late Archibald Cochran, on the 3d August, 1809, refer to, and "are connected with, one another, and must be viewed as con- "stituting one settlement of his estate: Finds, that in the "general disposition, which must be regarded as the last of these "deeds, and as forming the completion of the settlement, "Archibald Cochran expressly declares: — 'Whereas the estate "'and funds, real and personal, hereby settled by me on my "'said son, in fee-simple, may be nearly adequate to the special "'burdens with which the same stand charged, as well as the "'foresaid restricted provision; therefore, my said son, by "'accepting hereof, or my entailed estates, in terms of the "'settlements thereof, and the heirs succeeding to him therein, "'stand pledged and engaged, as aforesaid, to satisfy and pro- "'cure discharges and extinctions of every debt and obligation, "'provision, and bequest, of every description, created or con- "'tracted by, or incumbent on me; and that in such *habile*, "'proper, and effectual manner, as that the same shall hereafter "'cease to exist, or afford action or execution against my "'entailed estates.' Finds, that this declaration necessarily "implies, that the entailed estates were, by the entailer, intended "to be subject not to his debts only, but to his legacies, and that "the institutes and heirs of entail were bound to pay off these "legacies as well as debts, in order to clear these entailed estates: "Finds, that this declaration is followed by a clause, providing "a special arrangement for payment of part of the debts, out of "the rents of one of these estates; but finds no evidence in the "deeds, that the liability of the entailed estates, or heirs of "entail, was intended to be limited to the effect of this provision: "Finds, that the above declaration cannot be held *pro non* "*scripto*, nor effect be denied to the intention of the maker of "the deeds appearing thereby: Therefore, finds that the entailed "estates are liable to be affected for payment of the legacies

" libelled, in the same way as for payment of the entailer's debts; " and finds, that the said estates being so liable, the pursuer is " preferable on the rents of these estates to the defenders, who " claim only by virtue of assignation to those rents from the heir " of entail: Finds, decerns, and declares, in terms of the first " conclusion of the libel: Finds no expenses due to either of " the parties."

The respondents reclaimed against this interlocutor. The Court (*Second Division*) was equally divided in opinion, and therefore ordered a hearing in presence. Thereafter, on the 10th March, 1835, the Court pronounced this interlocutor: — " Find, that " the declarations in the general disposition and deeds of entail, " executed by the late Archibald Cochran on the 3d of August, " 1809, founded on by the pursuer, do not import as his inten- " tion, that the estates entailed by him should be liable to the " payment of the legacies or voluntary provisions bequeathed by " him, in the same manner as his own onerous debts: Find, " that, under the settlements in question, the pursuer has no " right or title to affect the entailed estates for payment of her " legacies: Find, that in respect of the title completed by infeft- " ment in the person of the trustee on the sequestrated estate of " the present heir of entail in possession, she has no preferable " right to the rents of the estate, to the prejudice of the trustee " and the personal creditors whom he represents, and that, in " the sequestration of his estate, she must rank as a personal " creditor thereon: Therefore, sustain the defences for the " trustee, and assoilzie him from the whole conclusions of the " libel: Find no expenses due to any of the parties, and decern: " And, *quoad ultra*, remit the cause to the Lord Ordinary, to " proceed farther therein as to his Lordship may seem just." The following were the opinions delivered by the Judges at this advising: —

Lord Justice-Clerk. — " I am glad we allowed the farther

" discussion, which has produced very able pleadings, and has " led us to attend minutely to the deeds, and the conclusions of " the summons. In the first place, it is indispensably necessary " to attend to the shape of the process. Miss Kerr pursues for " her own interest alone, but the claims of many others stand in " exactly the same situation. She raises only the question, how " far her provision can be made effectual against the fee of the " entailed estate, or against Cochran's life-interest in it, or " against the substitutes; and it is to be kept in view, that it is " to this question, whether the provisions are to affect the " entailed estate, that the judgment of the Court must be " limited. We must lay aside all consideration as to the unen- " tailed funds, which are not involved in the question raised by " this summons, which touches only the entailed estate. The " Lord Ordinary has found, ' that the three deeds executed by " ' the late Archibald Cochran, on the 3d August, 1809, refer " ' to, and are connected with, one another, and must be viewed " ' as constituting one settlement of his estate.' As to that " part of the interlocutor, I am clearly of opinion, and it is " admitted, that the whole three deeds must be looked to as " embracing the settlement of the testator, and I have no doubt " that they are to be taken in a combined view, as demonstrat- " ing his will. Then the Lord Ordinary proceeds: ' Finds, " ' that in the general disposition, which must be regarded as " ' the last of these deeds, and as forming the completion of the " ' settlement, Archibald Cochran expressly declares, " Whereas " ' the estate and funds, real and personal, hereby settled by me " ' on my said son in fee-simple, may be nearly adequate to the " ' special burdens with which the same stand charged, as well " ' as the foresaid restricted provision; therefore my said son by " ' accepting hereof, or my entailed estates, in terms of the " ' settlements thereof, and the heirs succeeding to him therein, " ' stand pledged and engaged, as aforesaid, to satisfy and pro-

" ' cure discharges and extinctions of every debt and obligation,
" ' provision and bequest, of every description, created or con-
" ' tracted by, or incumbent on me; and that in such habile,
" ' proper and effectual manner, as that the same shall hereafter
" ' cease to exist, or afford action or execution against my
" ' entailed estates:" Finds, that this declaration necessarily
" ' implies, that the entailed estates were, by the entailer, in-
" ' tended to be subject, not to his debts only, but to his
" ' legacies, and that the institutes and heirs of entail were
" ' bound to pay off these legacies, as well as debts, in order to
" ' clear these entailed estates: Finds, that this declaration is
" ' followed by a clause, providing a special arrangement for
" ' payment of part of the debt out of the rents of one of these
" ' estates; but finds no evidence in the deeds that the liability
" ' of the entailed estates, or heirs of entail, was intended to be
" ' limited to the effect of this provision: Finds, that the above
" ' declaration cannot be held *pro non scripto*, nor effect be
" ' denied to the intention of the maker of the deeds appearing
" ' thereby: Therefore finds, that the entailed estates are liable
" ' to be affected for payment of the legacies libelled, in the
" ' same way as for payment of the entailer's debts: And finds,
" ' that the said estates being so liable, the pursuer is preferable
" ' on the rents of these estates to the defender, who claims only
" ' by virtue of assignation to these rents from the heirs of
" ' entail.' Now, I am free to admit, that when the case first
" came before us, I did think we could not refuse to assent to
" this subsequent part of the interlocutor, then agreeing, as I
" did, with the view taken as to the intention of the maker.
" But looking to the words in the general disposition, and
" looking also to the two deeds of entail, I have now come to
" take a different view of his intention, and I am satisfied it was
" not his intention to make his entailed estates liable for these
" provisions, and that we cannot consider them as in the situa-

" tion of entailer's debts. He evidently considered that there " would be an ample sufficiency to answer all provisions out of " the unentailed funds, and, so far from there being any thing " indicating the intention, that the fee of the entailed estate was " to be answerable, the reverse is made out. He says, that the " heir shall be bound not only to discharge his debts, but the " whole provisions and bequests, so that they shall in no way " affect his estate; and, fully considering the whole deeds, I am " satisfied that that was the intention of the maker of them. " And therefore it appears to me that the entailed estate is not " liable, even subsidiarily, but that he intended to create merely " a personal obligation to discharge the provisions on his son, " and each heir who should take under the deed. If he had " really meant that the obligations were to be made real, it is " impossible that he should not have expressed it in clear and " habile terms. But suppose it possible to hold that it was his " intention to make the provisions real burdens on his estate, " I am satisfied, by the authorities referred to, that they have " not been made real burdens. It must be done in the clearest " and most explicit terms, in order to have this effect. If these " parties had proceeded immediately against Archibald Cochran, " they might have received their provisions; but they leave him " to manage as he pleased till he dissipated the funds, out of " which the provisions might have been paid. Then, if they are " not made out to be real burdens, there is no ground for sup- " porting the first part of the interlocutor, and I am satisfied " the case of Lord Macdonald was very different from this. " The summons, however, raises farther the question of the " liability of the heirs of entail in their order. That point has " not been decided by the Lord Ordinary, and I would rather " abstain from entering into it, and remit to the Lord Ordinary " to decide, but I cannot agree with the interlocutor pro- " nounced."

Lord Glenlee. — " I am entirely of the same opinion."

Lord Medwyn. — " This is a question of intention, and it is a " very important and difficult one, and has been anxiously dis- " cussed. I have never been able to agree with the Lord Ordi- " nary, though, so far, I consider the three deeds are to be taken " together, as forming one general settlement. It is clear that " it was the intention of the maker of these deeds that the pro- " visions should be paid, but it is equally clear, that he intended " them to be paid out of other funds than the entailed estates. " As to the important clause on which the question turns, if it " were intended to impose burdens not imposed by law, it is cer- " tainly most awkwardly expressed. Making a fund out of the " estate to pay the provisions, leads to the expectation that he " was not to lay the burden on the estate; and, accordingly, he " takes the heir bound to discharge the provisions. Even as to the " unentailed property, I doubt if these were made real burdens, " as the provisions are not specified; and I am not satisfied that " this was intended. The summons is drawn with an alternative " conclusion, and the first conclusion contains an alternative, and " for that the Lord Ordinary has decerned. He holds the lands " liable to be affected as for entailer's debts. I do not think the " provisions have any resemblance to entailer's debts, as they " were never binding on the entailer; and I do not think the " parties in whose favour they were granted could have secured " a preference for them by doing diligence within the three " years. No doubt, the heir stands pledged to pay them, but " only personally. They are not constituted a condition of the " grant, nor a burden on the disposition, but only on the heir, " who, besides, is taken bound to get discharges, so as to prevent " their affecting the entailed estate. There is an expressed in- " tention throughout that they were to be paid out of the other " funds. I cannot concur with the Lord Ordinary's view, as to " the construction of the injunction to obtain discharges, that it

" implied that the provisions were to affect the entailed estates, " and that so the heir is taken bound to discharge them. My " view was, that this was to prevent the heir from keeping them " up as debts against the entailed estate. The trustee, no doubt, " takes the rights of the heir *tantum et tale* as they were held by " him, but he cannot be affected by the personal obligation of the " heir; and therefore I am of opinion, that the provisions cannot " be made to affect the entailed estates, or the interest of the heir."

Lord Meadowbank. — " I have considered this question with " the most anxious attention, and I regret that I remain of " opinion with the Lord Ordinary, differing from your Lord- " ships, that these are burdens effectual against Cochran, or any " one in his right. I throw out of view altogether the amount " of the claims, which does not affect the question of law, nor " did I think how the deed might have been more clear, as I " just take it as it stands; but the grounds of my opinion are " these: — First, I must hold that all these deeds are to be con- " sidered as one, as if every clause in each deed were repeated " in every one of the three, as that is the only result of constru- " ing them as one settlement. Secondly, there are no precise " words necessary to indicate intention, and the Court, by legal " construction, must gather the intention. This is entirely a " question of intention, whether Mr Cochran, in executing one " general settlement, meant, or did not mean, that the parties " receiving the benefit of the landed estate, whether tailzied or " not, were to be liable for the provisions. Mr Cochran does " not favour one line in particular, for he shews a distinct inten- " tion to provide for all parties descended of his own body, and " I cannot suppose he meant to limit any of them to the fee of " the unentailed estates. He indicates the reverse, for he says " that the fee-simple will only 'nearly' discharge the debts and " provisions, and yet he grants other provisions in codicils! " Then, what is it the deeds do? The provision as to the sink-

" ing fund is indicative of an understanding, that the estates " would otherwise be responsible for the whole. Then look at " the clause referred to by the Lord Ordinary. 'Therefore my " 'said son, by accepting hereof, or my entailed estates, in terms " 'of the settlements thereof, and the heirs succeeding to him " 'therein, stand pledged and engaged as aforesaid, to satisfy " 'and procure discharges and extinctions of every debt and " 'obligation, provision, and bequest of every description, created " 'or contracted by, or incumbent on me.' Had it stopped " there, we might not have been able to draw the conclusion of " intention foregone; but then it proceeds thus, 'and that in " 'such habile, proper, and effectual manner, as that the same " 'shall hereafter cease to exist, or afford action or execution " 'against my entailed estates.' I think we have here got his " declaration, that he understood that his provisions and " bequests of every description were put on the same footing with " his debts. Then, was it incompetent for him to do so? I can " see no incompetency; and as I think all that was necessary " was to express intention, and that he has done so, I am for " adhering."

Lord Glenlee. — " No doubt, if the clause in the general " settlement is to affect the Ashkirk deed, we must apply it; " but even as to clauses occurring in the same deed, a difficult " question often arises, whether one clause is to affect matters " treated of in another part of it. There is no declaration, " *totidem verbis*, that the provisions were to be on a footing with " the debts. This is said to be implied, but I do not see from " what such implication follows. I would rather imply the con- " trary, and that the entailed estate was not to be liable to be " adjudged for them. The first thing to be attended to is, what " is consistent with common sense, as likely to be his intention. " Now, it is clear that he considered that he had left nearly " sufficient funds; and to make sure of Robina's provision, he

" made a separate provision for it. Her provision, however, " was a proper debt affecting the estate. In this situation, was " it a natural thing for him to suppose it likely that there would " be a deficiency in the other funds? He evidently did not ex- " pect this, and his impressions turned out true in fact, as he had " ample funds. But this was natural to him to suppose, that " unless he took the heirs bound to discharge the debts, &c. " they might make away with the funds, and that then these " would come against each heir succeeding: and, therefore, he " took the heir bound to obtain discharges. If, however, the " other construction be adopted, it would entirely defeat any in- " tention he could have had in inserting the clause; and, there- " fore, on the whole, there seems to me no warrant to imply that " he put the provisions on the footing of his own debts, but that " they are mere personal debts of the heir."

The cause then returned to the Lord Ordinary, (now Mon- crieff,) who, on the 19th December, 1835, pronounced the follow- ing interlocutor, adding the subjoined note.—" The Lord Ordinary " having considered the record, as closed on the summons and " defences, and the interlocutor of the Court, and having heard " parties' procurators on the remaining point in the cause, " Finds and declares, that Archibald Cochran, and all the heirs " of entail substituted to him by the deeds of entail of the estates " of Ashkirk, and other lands, in their order, as they may suc- " cessively succeed to, and obtain possession of, the entailed " estates, are bound and obliged, as a condition of their holding " the said entailed estates, and drawing and enjoying the rents " and proceeds thereof, according to their respective rights and " interests, or as an obligation consequent thereupon, to satisfy " and pay the provisions or bequests made and granted by " Archibald Cochran the entailer, by his general settlements, to " and in favour of the pursuer, with the lawful interest due " thereon, in so far as the same may not have been satisfied and

"paid before the succession of such heir, and decerns accordingly: But reserves all questions as to the effect and application of this finding and decerniture, in regard to any individual heir-substitute who may succeed to the said estates, when the right of succession may open to him or her: Finds no expenses due to any of the parties."

"*Note.*—The Lord Ordinary can see no question remaining to be determined upon this record, but the abstract question involved in the demand of a declaratory finding and decree, that, by the legal construction of the entailer's settlements, an obligation is laid on all the heirs of entail successively, to pay the pursuer's provisions, in so far as they may not have been paid before the succession of any heir; and to that only he has directed his attention.

"The Court have decided that the provisions cannot be made the grounds of adjudication against the entailed estate. The Lord Ordinary takes that judgment, and the principles of it, as conclusive against the first point in this declarator. But the question as to the personal liability of all the heirs in their order, is left distinctly and expresly open. Neither is there the slightest inconsistency between the finding that the entailed estate cannot be affected, and the supposition that all the heirs may be successively liable. An example of this may be seen in this very deed of entail, where it is declared, with regard to the provisions for wives and children, that the fee of the estate shall not be affected for them; but at the same time, that one-third of the free rents, 'and the persons of 'the heirs or substitutes in fee or liferent,' &c. and all other estates belonging to them, shall be liable to execution for such provisions. And a question precisely of this nature occurred in the case of Erskine *v.* the Earl of Mar, July 7, 1829, 7 *S.* and *D.* 844.

"The question, then, is, whether, upon a sound construction of the settlements of Archibald Cochran, an obligation was laid on all the heirs of entail to pay the provisions made by those settlements in favour of the pursuer, and other persons similarly situated? It is a clear principle, which was fully recognized by the Court in deciding the other question, that all the deeds of settlement made

" by the entailer must be considered together. Archibald Cochran " had the unlimited command of all his property. He executed the " three material deeds, — the deed of entail of Ashkirk, &c., the " entail of the lands in the county of Edinburgh, and the general " settlement, on the same day, the 3d August, 1809. These deeds " bear express reference to one another; at least the general settle- " ment proceeds upon the express narrative of the entail executed " at the same time, and bears the most pointed reference to it in " many points. The entail, from the nature of such deeds, is made " in a perfectly simple form, by disponing and obliging the granter to " resign the lands for new infeftment to himself in liferent, and his " son in fee, and to the heirs of entail meant to be called, under all " the usual conditions of a strict entail, and with reserved powers to " the heirs. But the entailer reserves to himself full power to alter " or revoke the settlement, or to sell, alienate, or burden, &c. at his own " pleasure. But though the entail is thus simple in form, there can " be no doubt in point of law, that it was perfectly competent for the " entailer, by any deed expressive of his will, and more especially by " a deed made at the same time, to lay upon all or any of the heirs " of entail, called as his gratuitous donees, and that either primarily " or subsidiarily, any obligations which he might think fit to impose; " and that he could do this while the fee of the entailed estate was " preserved entire, is equally clear.

" Archibald Cochran had other valuable estates and property, and " he designed to provide for the payment of his own debts, and for " the comfort of the younger members of his family. With this " view, he executed the general deed of settlement, by which he " conveys that property to his son; whom failing, to the other per- " sons mentioned, under the burden of payment of his debts, and " under the burden also of the provisions therein expressed, which " were afterwards increased by the two codicils of later dates. It " may be taken to be quite clear, as matter of intention, that the " testator meant that these provisions should, in the first instance, be " paid from the property conveyed by this general settlement, and " by the party who might obtain possession thereof. By the judg- " ment of the Court, it must be taken as settled also, that he intended

"to preserve the fee of the estate untouched: and by some words "which occur in the important clause on page six, it may be assumed "that he believed the separate property to be nearly sufficient for "answering all those burdens.

"But the testator may be presumed to have foreseen that the "provisions might not be paid by his immediate heir taking the "whole property. By many accidents, the unentailed estate and "effects might not at his death be sufficient, or even nearly sufficient. "He might suffer losses, or he might have miscalculated the value of "such property, as many other testators have done. His immediate "heir might be of an improvident character, and the effects in his "own hands might be spent or carried off by his own creditors, "before his near relations, naturally more abstinent, could render "their debts effectual; and he might die at an early period, leaving "his affairs in embarrassment, and the other members of the family "exposed to the utmost difficulty, or placed in an impossibility of "recovering their provisions from his estate. However fixed, there-"fore, the testator's intention and belief might be, that the provisions "should be paid by his first heir, and that out of the separate funds "conveyed, nothing can be more probable or rational than that he "should not intend to leave his other children to depend absolutely "on that probability, or that he should provide that the obligation "for their provisions should attach to all the heirs of entail succes-"sively. The question is, whether he has expressed his intention to "this effect or not.

"This depends mainly on the clause on page six of the "general settlement. The clause is preceded by the mention of a "particular provision and a restriction of it. But, notwithstand-"ing this, it is plainly substantive and declaratory as to all the pro-"visions. It is out of all question for any Court to hold so pointed a "clause *pro non scripto*. It must receive effect according to the true "meaning expressed in it, as well as the Court can find that mean-"ing. And though there may be some confusion in the form of it, "the Lord Ordinary is of opinion that it does explicitly declare the "testator's understanding and intention, that every heir of entail "accepting of the entailed estate, whether succeeding to any other

" property or not, should be bound to satisfy every debt, obligation, " provision, or bequest created or contracted by the testator, or in- " cumbent on him, so that the same should cease to exist. It is " introduced by a declaration that whereas the fee-simple of the " estate given to his son might be 'nearly adequate' to the special " burdens, &c. as well as the restricted provision immediately before " alluded to; therefore, &c. Now, it is justly argued that this ex- " pression, 'nearly adequate,' necessarily implies that the testator " had it in his mind that they might not be quite adequate. But if " he was looking at that possibility, the conclusion is inevitable, if " there are words following of sufficient force, that the very thing he " intended by the clause was to declare a general and ultimate " liability of all the heirs of entail, so as to secure the full payment " of the provisions in all events, and if he intended this generally, it " will be very difficult to limit the obligation.

" Upon that narrative what does he declare? 'Therefore, my said " 'son, by accepting hereof, or my entailed estates, in terms of the " 'settlement thereof, and the heirs succeeding to him therein, stand " 'pledged and engaged, as aforesaid, to satisfy and procure dis- " 'charges and extinctions of every debt, and obligation, provision, " 'and bequest of every description, created or contracted by, or in- " 'cumbent on me, and that in such habile, proper, and effectual " 'manner, as that the same shall hereafter cease to exist, or afford " 'action and execution against my entailed estates.' From the last " words an implication was deduced, that he meant his entailed " estates to be liable. But the Court have held that such an impli- " cation is not warranted, or is not sufficient, there being no direct " declaration that the entailed estates should be liable to be attached " for the provisions, or for any thing but debts which by law affected " them. But this is not the state of the question as to the liability " of the heirs of entail. As to them, there is a direct declaration of " an obligation imposed; and the Lord Ordinary cannot construe the " clause otherwise than that they were all to be liable generally, by " their acceptance of the entailed estate, for the provisions and " bequests as well as for debts. It is plainly said, that the testator's " son, either by 'accepting hereof,' or by accepting of my 'entailed

" 'estates in terms of the settlements thereof,' shall be so liable,— " the obligation being created by either fact. Then the words are " added, 'and the heirs succeeding to him therein,' plainly designat- " ing the heirs succeeding to him in the entailed estate. And the " clause bears, that all these heirs 'stand pledged and engaged, as " 'aforesaid, to satisfy,' &c. The defender insists much on the words " 'as aforesaid,' as if they so qualified the clause as to make it import " no more than a repetition of the obligation previously laid on the " disponees of the general settlement. But this will not do. Why " introduce the entailed estate — the settlement of the entailed estate " — 'the heirs succeeding to him (A. Cochrane) therein?' There " must have been a definite meaning in this. They are declared to " stand pledged and engaged; and this cannot be extinguished by " the words 'as aforesaid.' The Lord Ordinary reads these words " very differently. In so far as they may have been meant to have " any particular force, this seems to be the import: 'In the same " 'manner as I have already declared, that the disponees in this settle- " 'ment, by accepting thereof, shall be subject to the burdens, so I " 'now declare that my son, either by accepting it, or by accepting " 'the entailed estate, and also all the heirs succeeding to him, shall " 'stand pledged and engaged,' &c. It is the declaration of what the " testator meant and understood to be the engagements of all his " heirs, whether under one deed or under another.

" This is the view which the Lord Ordinary takes of the clause, " and he sees nothing in any part of the deed which can take away " what appears to him to be the only construction of which the clause " will admit, giving effect to every word of it. The testator probably " thought that the burden would be very light, which may be the " meaning of the narrative. But that will not alter the legal effect " of the obligation expressly created. The Lord Ordinary will only " farther observe, that, though the case of Macdonald, May 29, 1832, " may not be precisely of the same kind, the judgment which laid the " provisions on the succeeding heirs of entail, without relief against " the executors of the first heir, is, in his opinion, much stronger " than any thing that is called for in the present case.

" The counsel of the defender urged very anxiously on the Lord

"Ordinary an argument to shew that the pursuer was barred from "insisting in this action, in consequence of her not having duly pro- "ceeded against the unentailed estate, and discussed the estate of "Archibald Cochran; and it was confidently stated that the provisions "constituted real burdens on the entailed estate, and that this was "even admitted by the trustee in his defences in this cause. The "Lord Ordinary has not neglected that argument; but he thinks "that there is no such question before him, and that, so far as there "are data on which he could judge, it is not sound, to the effect "which must be maintained, 1*st*, There is no such plea in this record, "the pleas stated in the defences being confined to the construction "of the deeds of settlement. 2*d*, The Lord Ordinary does not find "that the Court decided on any such ground, when they found the "estate not liable. 3*d*, The conclusion of the summons is merely "declaratory, and is not at all affected by such a plea, which must "first assume that the obligation was laid on all the heirs of entail. "The effect of this otherwise is not within this declarator. 4*th*, So "far as the Lord Ordinary can judge, it rather appears that the pur- "suer did claim a preference in the ranking with Archibald's credi- "tors, and that the claim was disallowed by a judgment of the Court. "But the point not being raised in the record, and the facts not being "distinctly brought out, he may be mistaken in this. But 5*th*, If he "were to judge of a question not raised, and which cannot be decided, "he should be inclined to think, as at present advised, that the pro- "visions were not made real burdens on the unentailed estates, and "that what is supposed to be an admission of it is not an admission "of any such thing. The estates were indeed conveyed under the "burden of the debts and provisions, and the precept of sasine is also "under the burden of them. But the question of real burden depends "on other considerations. The trustee's plea is upon *mora* simply. "Yet even he does not state either this, or the other point in the "pleas subjoined in his defences. The reverse of the assumed "admission seems to be stated in his minute."

On the 9th February, 1836, the Court adhered to the Lord Ordinary's interlocutor.

KERR *v.* KEITH. — 10th June, 1842.

The appeal was against the interlocutor of the Lord Ordinary of 13th May, 1834, in so far as it did not find expenses due, and against the interlocutor of the Court, 10th March, 1835; and also against the interlocutors of the Lord Ordinary, and the Court, of 19th December, 1835, and 9th February, 1836, in so far as they did not find the appellant entitled to expenses.

Mr Stuart, and Mr Anderson, for the appellant. — I. It is fixed, as the law of this case, that the three several deeds of 3d August, 1809, are to be read as one. The debt sued for is not struck at by any of the deeds, but, on the contrary, is one which the entailer has himself created. It is not necessary to resort to the deeds for a right to adjudge the lands for payment of debts, the law gives that right, unless the deeds expressly take it away. The deeds, no doubt, prohibit the heirs from contracting debts, but their liability for this debt is made one of the conditions of their title; and the title of heirs of entail is one of *plenum dominium*, exposed to all the liabilities which the law imposes, unless in so far as it is limited *ex facie* of the title, and upon the strictest construction of its terms; so entailed lands have been held to be adjudgeable on a personal bond, because executed under powers given by the entail, Crawford *v.* Hotchkis, 11th March, 1809, 15 *F. C.* 258; Jardine *v.* Lockhart, 11 *S.* and *D.* 720; M'Donald *v.* M'Donald, 10 *S.* and *D.* 584; Porterfield *v.* Howden, 1 *Sh.* and *M'L.* 739; Wilson *v.* Elliot, 12 *F. C.* 975. Here the debt is created by the entailer himself, against the heirs, and is put by him on the same footing with his own ordinary debts, and nothing is done by him to take away the ordinary remedies of law. When he did intend these remedies to be taken away, he so expressed himself, as in the case of provisions to wives and younger children, in regard to which, by both the deeds of entail, he expressly declares, that they shall not be the foundation of execution. Whereas, in the general disposition, he

contemplates the possibility of the debt in question forming the ground of execution against the lands, and imposes on the heirs of entail a personal obligation to prevent such a consequence.

II. The debt of the appellant being created by the entailer, she has a preferable right for payment of it over the creditors of the institute, who, through Keith their trustee, possess under a conveyance from the institute. The appellant, if entitled to adjudge on the arguments already used, would be entitled to do so, and to obtain possession, by process of maills and duties, to the exclusion of the creditors of the institute, whose debts are prohibited by the entails, and who could only compete *inter se* upon the rents accruing during the life of their debtor. If so, she should obtain the same preference in the ranking without the necessity of adopting these proceedings. This has been recognized in the case of inhibition, where the creditor has not been required to perfect his preferable diligence by adjudication, but has been allowed to rank as if it had been completed, Monro *v.* Gordon, *Mor.* App. Inhib. No. 1; 2 *Bell's Com.* 147; M'Lure, *Mor.* App. Compet. No. 3.

III. Archibald Cochran, if insolvent, would clearly have possessed under the burden of the provisions, and Keith is but his assignee, *qui utitur jure auctoris;* he must therefore give effect to the condition by which his author's right was qualified. The fee is not divested out of Archibald by his conveyance to Keith, though followed by infeftment. All the effect of that conveyance is merely to assign the rents during Archibald's life, with his powers as heir of entail.

IV. Keith has no interest to object that the appellant has not obtained adjudication, as the effect of such a diligence, if sued out, would be to void his author's right.

KERR *v.* KEITH. — 10th June, 1842.

Mr Solicitor General and Mr Milne for the respondent Alex. Cochran. — Mr Pemberton and Mr Gordon for the respondent, Keith. — I. In order to constitute a debt a real burden upon lands, and subject them to adjudication for its payment, it is not enough that the disponee or heirs are taken bound to pay. The lands themselves must expressly be burdened, Stewart *v.* Home, *Mor.* 4649; Allan *v.* Cameron, *Mor.* 10265; Martin *v.* Paterson, *Mor.* Per. and Real, app. No. 5; M'Intyre *v.* Masterton, 2 *S.* and *D.* 664. The two entails do not even make mention of the appellant's legacy, or of the general settlement in which it is contained. The general settlement alone specifies the legacy, and not as a burden on the lands, and if it had done so, it would not, as a separate deed, have been effectual for that purpose. Chalmers *v.* Creditors of Redcastle, 27th January, 1791, 1 *Bell. Com.* 588; Tailors of Aberdeen *v.* Coutts, 2 *Rob.* 296.

II. Assuming that the deed does not, in terms, make the legacy a real burden on the lands, but imposes its payment as a condition of holding them, that will not advance the appellant's argument, still the condition must be so expressed as to impose something more than a personal obligation; it must be made distinctly and explicitly a burden following the lands, and entering the infeftment: but there is no declaration that the land shall be held under the condition of paying the legacy; any notion of liability is derived merely by implication from the terms of the personal obligation.

III. The entailer's intention was rather that the legacy should not be a real burden. Those obligations which are to be real burdens, are distinctly specified; this legacy is not of the number, neither are the provisions to wives and younger children; but as they are not, they are inserted in the fee-simple conveyance of Gilston and Over Brotherstones, which, with the maker's move—

able estate, are conveyed as a fund for their payment, and these parts of his property are relieved of Robina Cochran's provision in order to make sure of their sufficiency, so "as that the same "shall hereafter cease to exist or afford action or execution "against my entailed estates." Any implication of an admission by this, that these were debts or provisions capable of being the foundation of such execution, is applicable to Robina Crawford's provision, which was of this nature, as being onerous in its origin. Classing the debts and legacies together in the clause, did not alter the nature of each, so as to make them identical in their effects, and even if the sentence quoted had reference to gratuitous provisions, it would be contrary to all the principles of construction that these words intended to guard against, should have the effect given to them of creating, a real burden. Baugh *v.* Murray, 12 *S.* and *D.* 279.

IV. The effect of the adjudication under the sequestration, and of the disposition by Archibald Cochran in favour of the respondent, Keith, followed by infeftment, is to vest in him a title to Archibald's life-interest, preferable to that of any mere personal creditor; 2 *Bell. Com.* 191; Nairne *v.* Gray, 15th Feb. 1810, 15 F. C. 588; Grahame *v.* Hunter, 7 *S.* and *D.* 13; Graham *v.* Alison, 9 *S.* and *D.* 130. Any effect which the personal condition imposed upon the bankrupt of paying off the legacy, might have as against him individually, could not affect the feudal title made up by the respondent. Miller *v.* Wright, 14 *S.* and *D.* 1087; Mansfield *v.* Walker's trustees, 11 *S.* and *D.* 813.

V. Assuming that the appellant's legacy is a real burden, entitling her to adjudge the fee of the lands for its payment, still there is nothing in the entails irritating the heirs' right in case of such an adjudication being led, and as he is, to the extent of his

own life interest, in the same condition in regard to it as a fee-simple proprietor, even if the appellant were to lead an adjudication of the fee of the lands, Archibald Cochran's life interest would necessarily be excluded from the effect of such adjudication, by the prior and so preferable adjudication and disposition in favour of the respondent, and in that way she would only be entitled to rank *pari passu* on such life interest with the other creditors, which she has been already allowed to do.

VI. But, moreover, any claim of preference by the appellant, is excluded by her own *mora* and dealing with the bankrupt. By the general disposition, funds were specifically appropriated for payment of her legacy, but instead of obtaining payment, she allowed nine years to elapse, during which the bankrupt squandered these funds. She cannot now be allowed to recur upon the other estates, on the same principle upon which creditors refraining from enforcing payment of their debts where the funds were adequate for the purpose, have not been allowed to draw back from legatees, after a lapse of years, the legacies paid to them. Robertson *v.* Strachan, *Mor.* 8087, *Ersk.* III. 9, 46; Wallace *v.* Grierson, 16th May, 1821, 20 F. C. 343.

A cross appeal was also taken by Alexander Cochran, to the interlocutor of the Lord Ordinary of 19th December, 1835, and the interlocutor of the Court adhering to it on 9th February, 1836.

Mr Solicitor-General and Mr Milne. — I. Legatees are not entitled to payment out of the estate of the testator, of whatever nature it may be; their fund of payment is the moveable estate, and is confined to it, unless the terms of the deed giving the legacy expressly subjects the lands in liability. Here the maker of the deed expressly conveyed both real and personal estate for

payment of the appellant's legacy, and she cannot be entitled to go beyond these, and come upon the heirs of entail. Hill v. Hunter's Trustees, 14th May, 1818, 19 F. C. 506.

II. The testator no where mentions the legacy in the deeds of entail, and the only clause in the general settlement which can by possibility be suggested as throwing any liability on the heirs of entail, was evidently introduced not with a view to the legacies, but to the onerous provision of Robina Cochrane, and to give a reason why the general estate was relieved of the burden of it. The legacies are mentioned only by recital, and not substantively, which they would have been had the intention of the clause been to originate any obligation as to them, and every other part of the deed discovers an intention to relieve the heirs of entail, not to burden them with the legacies.

III. The executors and disponees of the fee-simple estate were the parties primarily liable for the appellant's legacy, *Bank.* III. 5, 68 and 69; *Ersk.* III. 8. 24. and III. 8. 52; *Stair*, III. 5. 17; Nasmyth v. Hamilton, 2 *Bro. Supp.* 659; Walls v. Maxwell, *Mor.* 3561. The heirs of entail were therefore entitled to have them discussed *primo loco*, *Ersk.* III. 3. 61, and III. 8. 53. And if *laches* have taken place in this discussion, the heirs are relieved of their subsidiary liability, Innes v. Sinclair, *Mor.* 3567; *Ersk.* III. 9. 46; Robertson v. Strachan, *Mor.* 8087; Blair v. Anderson, and Colquhoun v. Stirling, *Mor.* 3572. For the reasons suggested in the 6th answer to the original appeal, the appellant has been guilty of laches, and has lost all claim against the heirs of entail, supposing such to have at at any time existed.

The respondent Keith also objected to the competency of the appeal, as against him.

KERR *v.* KEITH. — 10th June, 1842.

Mr Pemberton and Mr Gordon. — The interlocutor of the Court, on the 10th March, 1835, disposed of every part of the libel in which this respondent had any interest; all that remained to be discussed after that, was the liability of the heirs of entail, in which the respondent had no concern. The time then within which appeal could have been taken as against the respondent, expired on the 10th March, 1837, or the lapse of fourteen days after the meeting of the next ensuing Parliament, but the petition of appeal was not presented until the 18th February, 1839. It is consequently incompetent, and is not saved by the provisions of 48 Geo. III. cap. 151, against appeal of interlocutory judgments; the judgment here was final, not interlocutory, as to this respondent, and the interlocutors referred to by this statute are between the same parties as are interested in the interlocutor which conclusively disposes of the whole cause. An earlier appeal might have interrupted farther procedure in the Court below on the remaining question in the cause, but *sibi imputet* to the appellant, that she joined this question of the liability of the heirs of entail with matters between other parties, who had no interest in it.

Mr Stuart, and Mr Anderson, for the appellant. — The appeal is perfectly competent under the 15th section of 48 Geo. III. cap. 151, which allows appeal against all "or any interlocutor that "may have been pronounced." It is said, that the interlocutor of 10th March, 1835, was final as to the respondent. But a decree is not final until it is extracted, *Bank.* IV. 36, 1 and 3, *Stair*, IV. 46, 4 and 26; and the standing order of 24th March, 1735, as amended by the order of 22d June, 1829, recognizes this as the character of a final decree. Not only was the interlocutor of 10th March, 1835, not extracted, but leave to extract it was never asked, without which it could not have been done, *Bell. Dict.* 522; Rothsay *v.* M'Neil, 17th November, 1789; Lorn *v.* Denny, 20th December, 1796: *Hume*, 14. In truth, the inter-

locutor was not final for the purposes of appeal; that interlocutor only is final which, according to the 48 Geo. III. cap. 151, disposes of the "whole" merits of the cause, whereas the interlocutor of 10th March, 1835, contained a remit upon other parts. Appeal against it, therefore, could not have been taken without the leave of the Court, and the grounds upon which that leave has been refused in other cases, shews, that it would not have been given in this case, Hunter *v.* Dickson, 5 *S.* and *D.* 417; Eglintoun *v.* Walker, 5 *S.* and *D.* 418; Miller *v.* Morrison, 5 *S.* and *D.* 671; but the necessity for such an application is sufficient to shew the character of the interlocutor, and to negative the objection to the competency of the appeal.

LORD CHANCELLOR. — If the legacies had been imposed as a debt, and no more had appeared, that would have been a ground of adjudication; but it appears to me clear, that the testator has taken great pains to use language to shew, that he did not mean the estate to be adjudgeable.

Mr Stuart. — After that expression of your Lordship's opinion, it would not become me to trouble you any farther.

Lord Brougham. — I think the construction is perfectly clear, we all agree in it.

Lord Chancellor. — We have heard the case, and heard it at great length, and read all the papers, and considered them, and we have all come at last to the opinion, that the interlocutors are correct. I have been of that opinion some time.

Lord Brougham. — There is an observation with respect to the Judges changing their opinion.

Lord Chancellor. — I think the Lord Justice Clerk says: On farther consideration, and carefully reading the papers, I have preferred the opinion I have before expressed.

Lord Campbell. — I think the case was very properly disposed of in the Court below.

Lord Brougham. — The only question is, whether there ought to be something added by way of finding, to make it clear that the reservation is effectual. Taking it on the Lord Ordinary's interlocutor, there could be no doubt of that. I think the question being raised on the construction of a Scotch entail, it might be all very well to bring a cross appeal, as there was an appeal upon that; otherwise I think it would have been very wrong to have appealed, having the whole seven Judges on the real question.

Mr Stuart. — I know your Lordships have very frequently altered the opinions of the Judges when they were unanimous.

Lord Brougham. — Not on a mere question of construction.

Lord Chancellor. — The Lord Ordinary "Reserves all questions as to the effect and application of this finding and decerniture in regard to any individual heir-substitute, who may succeed to the said estates when the right of succession may open to him or her."

Mr Stuart. — The only other question is as to the trustee. Your Lordships observe the assoilzieing the trustee was by the interlocutor of Lord Moncrieff, which has been adhered to.

Lord Brougham. — Your objection was, that there was a doubt whether the reservation precluded any payment by the heir himself.

Mr Stuart. — We apprehend it was the intention of the Court to declare that by the true construction of the instrument, the heirs are bound?

Lord Brougham. — Yes.

Mr Stuart. — But to reserve the application of that principle till the case arises?

Lord Chancellor. — Yes.

Mr Pemberton. — Supposing the Court to be of opinion, that upon the true construction of the instrument, Archibald Cochran, and all the heirs of entail, were subject to this, the proper form would be to declare, that the heir was bound and obliged.

Mr Stuart. — The finding constitutes the obligation.

Mr Pemberton. — What I understand your Lordships to intend to express is, That according to the effect of the true construction of this instrument, the liability was imposed upon all the heirs of entail, as they should successively succeed to the estate, to discharge those debts; but what defence each separate heir of entail might have upon the ground of laches, and of not prosecuting the claim against the preceding heirs of entail, or on any other ground arising on the construction of the instrument, was reserved to that party when the case should arise between him and the pursuer.

Lord Brougham. — Does not the interlocutor reserve that?

Mr Pemberton. — I think not, my Lord, it declares an absolute obligation.

Lord Chancellor. — I consider it nothing more than the construction of the Lord Ordinary, adopted by the Court.

Mr Pemberton. — If that is so, that is sufficient.

Lord Chancellor. — That is our clear opinion.

Lord Brougham. — I thought your argument was, that the words "reserves all questions as to the effect and application of "the finding and decerniture in regard to any individual heir substitute who may succeed to the estate," was not applicable to Archibald Cochran, who had succeeded; and that, therefore, that ought to be made clear.

Mr Pemberton. — If your Lordships confine the declaration to that which I understand to be the opinion of the Court, on the construction of the instrument, our case would be open to us.

Lord Chancellor. — What I understand it to mean is, That it finds this to be according to the true construction of the instrument; that is all which is meant.

Lord Brougham. — But reserving the consideration of whatever may have been done as to laches and payment, and so on as to each individual heir. I really thought Mr Pemberton's objec-

tion had been that the words were not sufficient to govern the case of the heir who had succeeded.

Mr Pemberton. — I do not think they would be, my Lord; but if your Lordships were merely to introduce these words, "accor- "ding to the true construction of the instrument," that would remove all difficulty.

Lord Chancellor — We think it is sufficiently clear already; then I dare say, you will find out a way to take the opinion of the Court.

Mr Stuart. — There is no doubt about that, but my learned friend is trying to save the costs of the cross appeal.

Mr Pemberton. — Indeed, I am not, I have not heard one word about the cross appeal.

Lord Brougham. — We think, that if you had presented no appeal, there ought not to have been a cross appeal. I humbly move your Lordships, that the costs of the original appeal, and the costs of the cross appeal, be given. I see no reason whatever for a distinction.

Mr Stuart. — There is a question about the trustee. This is quite a different question as against the trustee; we are now cut out from the decree as it stands, although Lord Moncrieff, and all the judges set us right as against all the other heirs. Unless your Lordships set that interlocutor right, we have no claim at all against the institute.

Lord Brougham. — We hold your appeal as competent.

Mr Stuart. — Being competent, your Lordships have not yet disposed of the case.

Lord Brougham. — The appeal is against the trustee.

Mr Stuart. — We have brought him here; they said we could not bring him here, but your Lordships think we can. The interlocutor of the 19th of December, 1835, makes the institute, and all the heirs successively liable; we shall go back against the whole series of heirs. The argument of my learned friend, Mr

Gordon, was very ingenious to shew, that the effect of the sequestration was to give him a priority, but I apprehend that can hardly avail with your Lordships.

Lord Brougham. — Will one counsel on a side be here in the morning.

Mr Stuart. — Certainly, if it is your Lordship's desire.

Lord Brougham. — The Lord Chancellor is obliged to go, we cannot dispose of the case now.

Lord Campbell. — Mr Pemberton need not come down on purpose.

Lord Brougham. — We will dispose of it at the sitting of the House to-morrow morning.

Lord Brougham. — We proposed to take an opportunity this morning of disposing of the costs.

Mr Anderson. — There was a remaining point Mr Stuart did not speak to, namely, whether the finding with reference to the trustee could be sustained. That was involved in the first appeal, which your Lordships have held to be competent. By the interlocutor appealed against in the first appeal, the trustee is assoilzied from all the operation of the summons. The first conclusion of the summons was, to have it found that the provisions were a burden upon the entailed estates, or that the estates might be adjudged for payment of them. The second was, that at any rate there was a liability upon the heirs of entail successively, as a condition for taking up the estates. The third was, that the trustee ought to be ordained to rank and prefer the pursuer *primo loco*, upon the rents he had recovered.

Lord Brougham. — So far that fails as against the trustee.

Mr Anderson. — The interlocutor of the Inner House finds, "that the declarations in the general dispositions and deeds "of entail executed by the late Archibald Cochran, on the "3d of August, 1809, founded on by the pursuer, do not im-

" port as his intention, that the estates entailed by him should " be liable to the payment of the legacies or voluntary provisions " bequeathed by him, in the same manner as his own onerous " debts, and that under the settlements in question, the pursuer " has no right or title to affect the entailed estates for payment " of her legacies." Then there is another finding, to which I would just call your Lordship's attention, " that in respect of " the title completed by infeftment, in the person of the trustee " on the sequestrated estate of the present heir of entail in pos- " session, she has no preferable right to the rents of the estate, " to the prejudice of the trustee, and the personal creditors " whom he represents."

Lord Brougham. — That has been found against you here, we have affirmed that.

Mr Anderson. — I understood, my Lord, that my learned friend Mr Stuart, had not come to that finding. I understood your Lordships to have simply found, that the estates were not adjudgeable. But that does not dispose of the question with reference to the rents which the trustee had actually received.

Lord Brougham. — It was understood that we affirmed the interlocutor appealed from, and the only question reserved till this morning, was in consequence of your taking some distinction between the case of the trustee and the other case, in respect of the costs of the appeal.

Mr Anderson. — That was one point, but I also understood there was another with reference to the rents the trustee had received. Because your Lordships see that the trustee represents the heir of entail, and we conceive he ought not to be assoilzied from that conclusion which affects the heir of entail.

Lord Campbell. — Mr Stuart was heard until he brought his observations to a conclusion. Upon that argument the House expressed an opinion, that the interlocutor appealed from should be affirmed, and then the question arose about costs.

ord Chancellor. — We had affirmed the interlocutors, and the question arose about costs, and when we had decided on question of costs, as far as related to two of the parties, Mr rt said there was a difference with respect to the third, ely, the case of Keith, and there the matter rested. I was ed to go away suddenly.

ord Brougham. — Keith never appealed.

r Anderson. — He was represented. He presented several ions to have the original appeal dismissed as incompetent, he ultimately failed in this. There were Cases on the ques- of competency.

ord Chancellor. — Did he present a separate petition upon subject of the competency?

r Anderson. — He presented two separate petitions, and t the case hanging back upon the appeal for two sessions.

ord Chancellor. — These were petitions presented to the al committee?

r Anderson. — Certainly they were, my Lord.

ord Chancellor. — No costs are allowed on such occasions. has made two defences here, one on the competency, and upon the merits. He fails upon the competency, but he eeds upon the main question. Were there cases given in n the competency?

r Gordon. — By the appellants, my Lord.

r Anderson. — By both parties. We gave in a separate upon the competency. There was a separate case by the ellant, because the objection was made after the original case lodged.

ord Chancellor. — As far as relates to those points they have d upon those cases.

r Anderson. — And we ought to get the costs upon those s.

ord Chancellor. — Nothing more.

Mr Anderson. — And the consequential proceedings. The objection arose by the petition presented to the House, which was referred to the appeal committee, and then it was ordered to be argued along with the merits.

Mr Gordon. — May I be permitted to say, that it was considered a point of great difficulty.

Lord Chancellor, (*to Mr Anderson.*) — You must pay the costs as to that part in which you failed.

Lord Brougham. — The decision on the competency is against the other party, and they must pay the costs taxed by the proper officer, with respect to the question of competency, and that settles the whole question.

Mr Gordon. — It may be difficult to separate the questions.

Lord Chancellor. — The taxing officer will separate them. There will be no difficulty about that.

It is Ordered and Adjudged, that the said original appeal be, and is hereby dismissed this House, and that the said interlocutors, in so far as therein complained of, be, and the same are hereby affirmed: And it is farther ordered, that the appellant in the said original appeal, do pay, or cause to be paid to the said respondents therein, viz. the said Alexander Cochran, and Sir David Milne, his *curator bonis*, and the said William Keith, the costs incurred in respect of the said original appeal, the amount thereof to be certified by the Clerk Assistant: And it is farther ordered and adjudged, that the said cross appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same are hereby affirmed: And it is also farther ordered, that the appellant in the said cross appeal, do pay, or cause to be paid, to the said respondent therein, the costs incurred in the said cross appeal, the amount thereof to be certified by the Clerk Assistant: And it is also farther ordered, that the said petition to dismiss the original appeal as incompetent, be, and is hereby refused: And that the said respondent, William Keith, do pay, or cause to be paid to the said appellant in the said original appeal, the costs incurred in respect of the case and pro-

ceedings in this House, arising out of the said petition, the amount thereof to be certified by the Clerk Assistant: And it is also farther ordered, that unless the costs certified as aforesaid, shall be paid to the parties respectively entitled to the same, within one calendar month from the day of the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence, for the recovery of such costs as shall be lawful and necessary.

JOHNSTON, FARQUHAR & LEACH — SPOTTISWOODE & ROBERTSON — RICHARDSON & CONNELL, Agents.

[13th June, 1842.]

LIEUTENANT COLONEL JOHN GORDON, of CLUNY, *Appellant.*

JOHN CAMPBELL, W.S. *Respondent.*

Trust. — Found, that an heritable bond by trustees, which acknowledged receipt of money, and bound them *qua* trustees to repay it, and contained a clause for registration, in order to execution in common form, did not infer a personal liability against the trustees, beyond their possession of trust funds.

IN November, 1832, the testamentary and assumed trustees of Andrew Bell, deceased, of whom the respondent was one, borrowed of the appellant the sum of L.7000, and as security for its repayment, gave him an heritable bond over the trust estate, which, as to the parts material for the present purpose, was expressed in these terms: — "We, Andrew Bell Mabon, manager "of the Hull and Leith Shipping Company, Leith, and Charles "Bremner, Writer to the Signet, the surviving and acting "trustees nominated and appointed by the deceased Andrew "Bell, engraver in Edinburgh, conform to his several trust-"deeds, the first dated, &c. I, Andrew Bell, farmer at Glen-"corse, trustee assumed by the trustees above-named, in virtue "of the powers conferred on them by the said trust-deeds, con-"form to deed of assumption in my favour, dated and registered, "&c. I, John Campbell, Writer to the Signet, trustee also "assumed by the said other trustees. And we, Walter Paton, "ship-chandler in Leith, Thomas Paton, accountant in Edin-"burgh, and John Toper Gouthwaite of Roan, trustees also "assumed by the said other trustees, grant us hereby instantly "to have borrowed and received from Lieutenant-Colonel John

" Gordon of Cluny, the sum of L.7000 sterling, whereof we do " hereby acknowledge the receipt, renouncing all exceptions to " the contrary; which sum of L.7000 sterling, we, as trustees " aforesaid, bind and oblige ourselves, and the survivors or sur- " vivor of us, and such other person or persons as may be " assumed by us in virtue of the powers committed to us by the " said trust-deeds, and by which trust-deeds it is declared that, " when the trustees shall amount to, or exceed three, a majority " shall in all cases be a quorum, to content and repay to the " said John Gordon, his heirs, assignees, or successors whomso- " ever, at the term of Whitsunday next, 1833, with the sum of " L.1400 sterling, of liquidate penalty in case of failure in the " punctual payment thereof, and the due and legal interest of " the said principal sum from the date hereof to the said term " of payment, and half-yearly, termly, and continually there- " after during the not-payment of the said principal sum, and " that in Edinburgh, at two terms in the year, Whitsunday and " Martinmas, by equal portions, beginning the first payment of " the said interest at the said term of Whitsunday next to come, " for the interest which shall be due at and preceding that term; " and the next term's payment thereof at Martinmas immediately " following, and so forth half-yearly, termly and continually " thereafter during the not-payment of the said principal sum, " with a fifth part more of liquidate penalty for each term's " failure in the punctual payment of the said interest at the " terms above mentioned. And for the said John Gordon and " his foresaids their farther security and more sure payment of " the said principal sum, interest, penalty and termly failures " above stipulated, and without hurt or prejudice to the fore- " going personal obligation, but in corroboration thereof, we, " the said Andrew Bell Mabon, Charles Bremner, Andrew Bell, " John Campbell, Walter Paton, Thomas Paton, and John " Topez Gouthwaite, as trustees foresaid, and as specially autho-

" rized by the titles in our favour, to sell, burden, or dispose of " the subjects after described and conveyed in security, do " hereby sell, alienate, and dispone from us, and the survivors " or survivor of us, and such other person or persons as may be " assumed by us, in virtue of the powers committed to us by the " said trust-deeds of the said deceased Andrew Bell, heritably " but redeemably always, and under reversion, in manner after " mentioned, All and Whole those parts and portions of the " lands of Blainslie, &c.: Together with all right, title, and " interest, claim of right, property and possession which we, as " trustees foresaid, our predecessors and authors, had, have, or " can any way claim or pretend to the said several lands, or to " any part or portion thereof, in time coming; and that in real " security, and for payment to the said John Gordon and his " foresaids, of the foresaid sums of money, principal, interest, " liquidate penalties and termly failures above specified, if in- " curred: In which several lands, teinds, and others above dis- " poned, but redeemable always, and under reversion in manner " after-mentioned, we, the said Andrew Bell Mabon, Charles " Bremner, Andrew Bell, John Campbell, Walter Paton, " Thomas Paton, and John Toper Gouthwaite, bind and oblige " ourselves, as trustees foresaid, and the survivors or survivor of " us, and such other person or persons as may be assumed by " us, in manner foresaid, upon our own proper charges and " expenses, duly and validly to infeft and seize the said John " Gordon and his foresaids, &c. and for that purpose, we, as " trustees foresaid, bind and oblige ourselves, and the survivors " or survivor of us and our foresaids, at any time when required, " at our expense, to grant all necessary deeds in favour of the " said John Gordon and his foresaids, with procuratories of re- " signation, &c. precepts of sasine, and all other clauses needful: " Which disposition under reversion in manner after mentioned, " the several lands, teinds, and others above disponed, infeft-

" ments to follow hereon, the sale or sales to be made in virtue " of the powers hereinafter granted for that purpose, if the same " shall take place, and all deeds to be granted in consequence " thereof, together with the ratifications to be granted by us as " trustees foresaid, or our foresaids, we bind and oblige ourselves " and them, but *qua* trustees only, to warrant at all hands, and " against all mortals. Moreover, we, as trustees foresaid, do " hereby make, constitute and appoint the said John Gordon " and his foresaids, our lawful cessioners and assignees, not " only in and to the rents, maills and duties of the said several " lands, teinds and others foresaid, &c. But also in and to " the whole writs and evidents, rights, titles, and securities, old " and new, of and concerning the several lands, teinds, and " others before disponed, and in and to the tacks thereof, set " or to be set, whole clauses therein contained, and all action " and execution competent thereupon; surrogating and substi- " tuting the said John Gordon and his foresaids in our full right " and place of the premises, with full power, &c. to them " to procure themselves infeft and seized in the same at our " expense, and generally to do every thing that we, as trustees " foresaid, might have done before granting this assignation; " which assignation, in so far as concerns the writs and evidents, " we bind and oblige ourselves and our foresaids, *qua* trustees, " to warrant at all hands, and in so far as regards the rents, " from our own facts and deeds only; and we consent to the " registration hereof in the books of Council and Session, or " others competent, therein to remain for preservation, and that " letters of horning on six days' charge, and all other legal exe- " cution, may pass on a decree to be interponed hereto, in com- " mon form; and for that purpose we constitute

our procurators, &c.

" Declaring always, as it is hereby expressly provided and de- " clared, that the said several lands, teinds and others, with the

" pertinents before disponed, are and shall be redeemable by us,
" the said Andrew Bell Mabon, Charles Bremner, Andrew Bell,
" John Campbell, Walter Paton, Thomas Paton, and John
" Toper Gouthwaite, and the survivors or survivor of us, as
" trustees foresaid, and such person or persons as may be assumed
" by us as co-trustees, in manner foresaid, at the said term of
" Whitsunday next, and that by payment to them of the said
" principal sum of L.7000 sterling, interest due thereupon,
" liquidate expenses and termly failures before specified, if in-
" curred; declaring always, that all expenses of infefting the said
" John Gordon or his foresaids in the premises, and expenses
" and charges incurred in the entry of their disponees, and in
" discharging or conveying this security, including the fees of
" preparing, revising and recording any deed or deeds connected
" therewith, conform to an account thereof to be rendered on
" their honest word, shall in every event be borne and paid by us
" as trustees aforesaid; declaring also, as it is hereby expressly
" provided and declared, that if we, the said trustees, or the sur-
" vivors or survivor of us, or those that may be assumed by us
" as co-trustees as aforesaid, shall fail to make payment of the
" sums that may be due under the personal obligation above
" written, within three months after a demand for payment shall
" be intimated to us, or quorum foresaid, personally, or at our
" dwelling-places, if within Scotland, or if furth thereof, at the
" market-cross of Edinburgh, in presence of a notary-public and
" witnesses, then and in that case it shall be lawful to and in the
" power of the said John Gordon or his foresaids, immediately
" after the expiration of the said three months, and without any
" other intimation or process of law for that effect, to sell and
" dispose of the whole or any part of the said several lands,
" teinds and others above disponed, by public roup, on previous
" advertisement once every week, for eight weeks, in the Edin-
" burgh Evening Courant and Edinburgh Observer newspapers,

" or in any two newspapers which may be published in Edin-
" burgh at the time, and for that end, with full power to them
" to enter into articles of roup, and to grant absolute and irre-
" deemable dispositions to the purchaser or purchasers, contain-
" ing procuratory of resignation, precepts of sasine, clauses bind-
" ing us as trustees foresaid in absolute warrandice of such dis-
" positions, and obliging us to corroborate and confirm the same,
" and all other clauses needful, and to grant all deeds necessary
" by the law of Scotland, for rendering the said sale or sales
" effectual, declaring that the purchaser or purchasers shall have
" no concern with the application of the price or prices, but shall
" be completely exonered thereof by the discharge of the said
" John Gordon or his foresaids, and the sale or sales shall be
" equally good to the purchaser or purchasers as if we ourselves
" had made them. — And farther, &c. In witness whereof these
" presents, consisting of this and the nine preceding pages of
" stamped paper, written by Daniel Forbes, clerk to Messrs
" Robertson and Bennett, Writers to the Signet, are sub-
" scribed by a majority and quorum of us, the said trustees."

This bond was signed by all of the trustees, with the exception of Bremner, and was duly recorded.

The interest upon the bond was duly paid up to Whitsunday, 1837, but not having been paid at Martinmas, 1837, the appellant extracted the bond, and on the first of December of that year, gave the trustees a charge of horning for payment of the full sum borrowed, with half a year's interest.

The letters of horning recited the personal obligation in the bond, and directed a charge to be given to the trustees " per-
" sonally, or at their respective dwelling places," and then proceeded thus: — " As also to make payment to the complainer of
" the legal interest of the said principal sum for the half year
" from the said term of Whitsunday 1836, to the term of Mar-
" tinmas last, with one-fifth part more of liquidate penalty in-

" curred through failure in punctual payment of the said half " year's interest at the said last mentioned term; and farther, to " make payment to the complainer of the said interest of the " said principal sum from and after the said term of Martinmas " last, half-yearly, termly, and continually as aforesaid, during " the not-payment of the said principal sum, with a fifth part " more for each term's failure in punctual payment of the said " interest, at the terms above mentioned, the terms of payment " being always first come and bygone, and that within, &c. " Attour that ye lawfully fence, arrest, appraise, compel, poind " and distrain all and sundry the said Andrew Bell Mabon, " Andrew Bell, or Andrew Paton Bell, Walter Paton, Thomas " Paton, John Toper Gouthwaite, and John Campbell's whole " readiest moveable goods, gear, debts, sums of money, and " other moveable goods of every denomination poindable or dis- " trainable pertaining or addebted to the said Andrew Bell " Mabon, Andrew Bell, or Andrew Paton Bell, Walter Paton, " Thomas Paton, John Toper Gouthwaite, and John Campbell, " wherever the same can be found, make penny thereof, to the " avail and quantity of the foresaid sums, and see the said Lieu- " tenant-Colonel John Gordon completely satisfied of the same, " after the form and tenor aforesaid, in all points."

The execution of charge returned by the messenger bore, that by virtue of the letters of horning, he had charged the parties, " trustees as therein mentioned," to make payment of the sum in the bond, with interest from Whitsunday preceding.

Upon receiving this charge, the respondent wrote Hunter, the agent of the appellant, on the 1st December, 1837, in these terms: — " I have a charge of horning, and as I have had no " intromission with, or management of, these funds, I beg to " know what you propose to do in regard to me personally, as I " do not wish to put the estate to any expense by seeking a legal " protection, if you satisfy me you have no hostile intention " against me personally. I am," &c.

On the same day Hunter answered: — "You, and the other "obligants in the bond, (of whose intromissions I know nothing,) "have got a charge of horning on your personal obligation, "because Colonel Gordon can neither get payment of his prin- "cipal sum which he called up, and has been looking for, since "Martinmas 1836, nor of the interest due at last term. If this "interest be now paid, and an assurance be given that the prin- "cipal sum will be paid at Candlemas, or even at Whitsunday "next, the diligence will not be pressed; but as you repeat the "threat of legal proceedings which you threw out on receiving "the charge of horning last winter, and as I told you that "Colonel Gordon was unconscious of any ground of objection "which you and the other obligants in the bond could state "against payment of the sum in your bond to him, I must now "insist that you and your co-trustees shall engage to pay your "bond without future objections, and without occasioning trouble "or delay by, at any time, resorting to a bill of suspension or "other legal process in reference to your bond, or that the "trustees (finding caution in common form) shall now enter "upon the discussion of the grounds of suspension (if there be "any) on which your threats of resorting to legal proceedings "are founded. Why has the estate of Blainslie been withdrawn "from the market? I am," &c.

On the 2d December, the respondent replied: — "I am not "aware that the trustees are liable, except as trustees, who have "given Colonel Gordon a legal right to the estate, and any "trust-funds besides which they may have. I have no funds; "on the contrary, am in advance, and all that I am anxious "about is, to avoid being involved in discussions with which I "have had no concern."

On the 16th December denunciation was executed, and on the 9th January, 1838, Hunter wrote the respondent: — "I "have received peremptory instructions to follow up the charge

" of horning at Colonel Gordon's instance, against Blainslie's " trustees, (which has been denounced and recorded,) with ulti- " mate diligence, unless immediate payment be made of a sum " equal to the interest due at Martinmas last, and an assurance " given as to payment of the principal in terms of my letter to " you of 1st December last. You will therefore please arrange " accordingly in the course of to-morrow, as otherwise I must " immediately thereafter follow out my instructions."

The respondent answered on the 10th January, 1838: — " I " have yours this morning, and beg to repeat, that I am a " creditor of Mr Bell's trust-estate, and have had no intromis- " sions with it for many years, and, of course, cannot be an " object of your ultimate diligence without subjecting your client " to damages. As your letter intimates that you mean to get a " caption against me to-morrow, I beg to have a note from you, " saying you do not now intend to adopt that procedure, other- " wise I must, of course, apply for protection. I am," &c.

On the same day Hunter wrote the respondent: — " You " surely don't seriously tell me that, whatever be the state of " your accounts with Bell's trust, you are not bound to imple- " ment your obligation to Colonel Gordon, to repay to him a " sum which you acknowledge to have borrowed and received, " and bind and oblige yourself to repay, and the idea of holding " out a threat to deter him from following out the diligence to " which you consent, for enforcing implement of your obligation " in case of failure, is a very extraordinary one."

Upon receiving this last letter the respondent presented a bill of suspension against the appellant, without offer of caution, wherein he set forth that he was threatened with caption, as would appear from Hunter's letter of the 9th of January, which was given at length. The bill then continued thus: — " The " complainer is not in possession of any funds belonging to the " trust-estate of the late Mr Andrew Bell, nor does he act in

" any way as factor thereon. He has had no intromissions with " any of the trust-funds for upwards of twelve years, his only " connection with the estate being as one of the trustees and " law-agent in some particular cases connected therewith, in " which latter character the estate is considerably addebted to " him. The complainer and his co-trustees are using every " exertion to have the trust wound up, and the estate extricated " from its present difficulties, and particularly from these engage- " ments to Colonel Gordon, but this cannot be accomplished " with such despatch as would seem to be expected by the " charger. The suspender, however, on receiving Mr Hunter's " letter, wrote to him as per letter, a copy of which is herewith " produced, mentioning the steps that were being taken, and the " prospect of a speedy and complete arrangement of these affairs. " To this communication the only answer given was, that the " suspender must apply for suspension, as the instructions were " to proceed with ultimate diligence. In these circumstances, " the complainer submits, that, acting as he does, merely *qua* " trustee, and possessed of none of the trust-funds, and having " no intromissions with the estate in any respect, he cannot " legally be subjected to the distress of ultimate diligence. " Therefore the said threatened letters of caption ought and " should be *simpliciter* suspended, without caution or consigna- " tion."

The appellant put in answers to this bill of suspension, in these terms: — " All the personal diligence on the obligation " down to the caption he admits to be right, and does not com- " plain of; but he complains that it is not fitting that a caption " should be issued against him in his character of a trustee, to " enforce implement of an obligation which he granted in that " character. The charger submits there is nothing incongruous " in this, if the suspender and his co-trustees bound themselves " as trustees, and if letters of horning have been duly issued

" against them as trustees, upon which they have been duly " charged as trustees, and the charge having expired, they have " been orderly denounced rebels as trustees, and the denounced " horning has been regularly entered in the register of hornings, " as registered against them in their character of trustees; all of " which has been done, and was required to be done, in order to " the accumulation of interest with the principal, and the sus- " pender admits this as reasonable and proper. Upon what " principle, then, can the suspender call upon your Lordships to " interpose to prevent the diligence being farther followed out? " Is there any thing to prevent a caption being issued against " parties, whatever may be their character, after being in that " character orderly denounced rebels? A caption can be " issued against trustees, upon a registered horning against them, " with as much fitness as a horning can be issued on a registered " bond by them. They can be incarcerated as trustees, and in " the prison books they can be duly booked as trustees. In the " same way that the members of a company can be incarcerated " and booked for a company debt, and the company thereby be " rendered bankrupt, though the partners, as individuals, may " remain solvent. It may be as necessary to render trustees " bankrupt to prevent preferences, as to render a company " bankrupt; and unless the diligence of the law necessary for " this purpose be followed out, how is this to be accomplished?"

Upon advising the bill and answers, Lord Cunninghame (Ordinary,) on the 18th January, 1838, refused the bill by the following interlocutor, and added the subjoined note: — " The " Lord Ordinary having considered this bill, answers, and pro- " ductions, in respect that no precise and relevant statement is " given in the bill, nor any account exhibited by the complainer " to shew that the trust-funds are deficient, from circumstances " or causes which can affect the accounting of the complainer " and his co-trustees with the charger; and in respect that the

" bill is presented without caution, refuses the bill: Finds the " respondent entitled to expenses, and remits the account " thereof, when lodged, to the auditor to tax and report."

" *Note.* — Had this bill been presented on satisfactory caution, the " Lord Ordinary would have been disposed to pass it, notwithstanding " the very meagre statement of facts in the bill to account for the " alleged deficiency of funds on the estate for which the trustees " borrowed so large a sum from the charger in 1832.

" At the same time, the Lord Ordinary thinks it a question of very " considerable doubt, whether the trustees have not bound themselves " personally by this bond. They, no doubt, only bind themselves " 'as trustees, and the survivors and survivor' (not heirs and " executors,) 'and such other person as may be assumed by us in " 'virtue of the powers committed by the said trust-deed,' &c. &c. " Still, when trustees borrowed a sum, they may be understood as " guaranteeing the estate at least to be equal to the sum borrowed. " And Mr Thomson, in his Treatise on Bills, quotes an English case " where Chief-Justice Dallas ruled, that trustees granting bills must " be held to admit the trust-estate to be of that amount, unless they " specially limit their obligation 'to the extent of the trust-estate.' " See also a very strong case to the same effect in the First Division " of this Court in 1829. — Thomson, Shaw, vol. 7, p. 787.

" Still, as this is the case of a bond, and not a bill, a distinction " may be raised which it might be proper to try deliberately on ex- " pede letters of suspension, if caution had been offered. It is not " thought that in any view the diligence should be suspended without " caution. For, even after making every allowance for trustees, they " ought not to be allowed to stop diligence on such a bond, without " giving full security to a creditor who lent his money to them, that " the trust-funds have not been improperly expended or exhausted in " claims which such a creditor on the trust-estate as the charger " would not be bound to sustain. But nothing of that kind is shewn, " or even set forth with any distinctness in this bill, while, on the " contrary, the charger's statement, and the documents produced by " him, raise a strong inference that if there be any deficiency of the

" trust-estate here, it is from circumstances which the suspender " cannot found on in a question with the charger. Thus, if the " trustees granted the bond charged on in the face of an inhibition, it " is hardly possible to conceive that they can be allowed to charge the " inhibiting creditor's debt against the property disponed to the " charger. In like manner, their having allowed the interest on the " first security to run into arrear for years, is a very questionable " sort of administration to affect the charger.

" All these circumstances induce the Lord Ordinary to think that " this is a case in which it is not proper to dispense with caution."

The respondent reclaimed to the Court, and offered caution. The Court passed the Bill, and thereafter the letters were expede. Before any farther judicial procedure, a correspondence took place between the parties, with a view to extrajudicial arrangement. This, however, went off, and another half year's interest having become due, the appellant, on the 23d April, 1839, gave the respondent a second charge upon the same letters of horning for payment of this interest. The respondent presented a note of suspension of this charge, and upon advising the note, with answers, Lord Jeffrey, (Ordinary,) on 26th July, 1839, " passed the note without caution or consignation," and added this note: —

" *Note.* — The registered bond and horning (which are the neces- " sary warrants of the present charge,) being under suspension in a " previous depending process, seems to make the charge incompetent " in point of form, and the grounds of suspension in the previous " process being identical with those now maintained and brought " into question, the legality of any proceeding against the complainer " upon these documents, make it still more clearly incompetent in " substance and common justice. The case does not appear to the " Lord Ordinary to be attended with any difficulty."

The two suspensions were subsequently conjoined, and came to depend before Lord Moncrieff, as Ordinary, and a record was

made up upon reasons of suspension and answers, and a counter statement by the appellant, and answers by the respondent. In these papers the respondent alleged, that only L.4000 of the loan upon the bond had been actually advanced by the appellant. That the remaining L.3000 had, by the desire of Bennett, his then agent, been deposited in a bank in Bennett's name, until the creditor in a prior encumbrance, which this sum was intended to discharge, should be ready to take his money. That the respondent's co-trustees had, without his knowledge, arranged with Bennett, that the L.3000 should be lent to Messrs Sandeman, with whom Bennett was concerned in business. That Sandemans had repaid part of the L.3000 to Bennett, but had become bankrupt while the balance was in their hands. Letters, under Bennett's hand, were produced, which proved the truth of these averments.

On the other hand, the appellant denied that this transaction was done with his authority or knowledge, and repudiated any liability in respect of it; and he farther averred, that by the terms of the correspondence which had taken place between him and the respondent since the charge was given, the latter had promised to pay the debt, with interest, so as to preclude him from farther insisting in the suspension. These respective averments were followed by pleas in law founded upon them; but as the argument of the appellant, at the hearing of the appeal, was confined entirely to the degree of liability, appearing *ex facie* of the bond, the only plea maintained by the respondent, in the Court below, which it is necessary to notice, was this: — "I. The charger has no right, under the "bond and disposition in security, to do personal diligence "against the suspender for the principal sum and interest "therein contained; and the only competent mode by which "he can recover payment of his debt is, by adopting proceed-"ings against the trust property."

The appellant, on the other hand, pleaded: — "I. The "charge complained of was fully warranted by the document of "debt charged on.

"II. The suspender having borrowed the sum charged for, "under the promise and engagement, and in the circumstances "condescended on, and having granted the bond for its repay- "ment, which is now charged on, and having neither proved "nor averred matter relevant to discharge him of his liability to "repay the sum borrowed, the letters ought to be found orderly "proceeded."

Before the case was advised upon the record, the respondent lodged a minute stating, "That, without acknowledging any per- "sonal liability for the sums charged for, but solely in order to "save great loss and expense to the trust estate, under the "management of the suspender and his co-trustees, he, the sus- "pender, was willing to advance from his own private funds, a "sum sufficient to pay the whole principal sums and interest "contained in the bond and disposition in security held by the "charger, and also to consign in bank a sum sufficient to cover "the whole expenses claimed by the charger, as falling under "the penalty in the bond, or incurred in the two processes of "suspension, depending between the parties, till the question as "to these expenses should be determined, either by the Court, "or under a reference to Mr Guthrie Wright, or any other arbi- "ter to be mutually agreed upon. — That this offer had been "made in a letter dated the 17th September 1839, addressed by "the suspender to Mr Hunter, the agent for the appellant, and "under form of protest.—That, without acknowledging any lia- "bility for the sums charged for, the suspender now judicially "repeats the offer formerly made by him in his letter and pro- "test."

"That, in these circumstances, the Lord Ordinary would per- "ceive that the only point necessary to be determined in this

" process, relates to the question of expenses; and the Lord " Ordinary was accordingly moved to make avizandum, with the " view of closing the record, and afterwards appoint the parties " to debate upon that question."

The appellant answered this minute by referring to the correspondence between the parties, shewing that the difference between them was in regard to the liability for the expenses, which had been incurred, and concluded thus: — " The charger " is still willing to refer to the auditor of Court to tax his agent's " whole accounts, and to determine what sum is payable under " the stipulation in the bond as to liquidate penalty, over and " besides principal and interest; and on receiving payment of " the principal, interest and liquidate penalty, as ascertained, he " is ready to discharge or convey the bond and disposition in " security, and infeftment in question. In short, he is ready to " discharge or convey all claim of every kind under the bond in " question, including all claims for expenses at his instance, in " and regarding the several processes, as these shall be taxed and " ascertained by the award of the auditor, as referee. But he " declines, for the reasons appearing in the correspondence, and " others unnecessary to be stated, to make any claim for ex- " penses at the suspender's instance the subject of reference."

On the 21st December, 1839, Lord Moncrieff (Ordinary) pronounced the following interlocutor, and added the subjoined note: — " The Lord Ordinary, having considered the closed " record in these conjoined processes of suspension, and hav- " ing heard parties' procurators fully thereon, and made " avizandum; finds that there was no legal warrant in the " heritable bond and disposition on which the letters of horn- " ing were issued for charging the suspender as on personal " diligence, for payment of the debt in question, as due by " him personally and individually: Finds, *separatim*, that " after the first bill of suspension had been passed, it was

" not competent to give a second charge on the same bond and " letters of horning, which were already under suspension by the " first depending process: Therefore, and to the effect above " expressed, sustains the reasons of suspension in both processes, " suspends the letters, and decerns; but without prejudice to all " other questions between the parties: Finds expenses due, and " allows an account to be given in, and remits the same, when " lodged, to the auditor to be taxed; but reserves for future " consideration, after the account shall be audited, how far there " may be ground for some modification thereof.

" *Note.* — The minute and answers reduced this cause to a question " of expenses. The charger was offered full payment of the principal " and interest of his debt, and of all expenses incurred by him, to be " ascertained according to a reference proposed. The charger " agreed to this, except that he would not refer the question as to " the suspender's claim of expenses in the processes of suspension. " He wished to have it assumed that he only could have any claim of " expenses. In consequence, it became necessary to discuss the " merits of these suspensions, after all the subject-matter of them " was at an end.

" Now that they have been fully heard, the Lord Ordinary is of " opinion that the charges cannot be sustained. Looking to the first " charge, it is a charge on letters of horning taken on an heritable " bond granted by the defender and certain other gentlemen, ex- " pressly as the trustees of the deceased Andrew Bell, and the " warrandice clause bears in direct words, that they bind themselves, " 'but *qua* trustees only.' On a bond so conceived, the charger " takes letters of horning, of course according to the terms of the " warrant for registration, and charges the suspender, one of the " trustees, with the avowed purpose of personal diligence against " him, as being personally and individually liable for the whole " amount of L.7000, expressed in the bond, with interest. The Lord " Ordinary thinks this incompetent. The charger justifies it by " detailed statements of proceedings, by which he thinks Mr Camp-

" bell rendered himself personally liable for the debt. This may be " very possible, though the Lord Ordinary thinks that the charger " was far from succeeding in shewing it in the debate. But it is " nothing to the point. The charger might have had a very good " ground of action for his debt and all damages against Mr Campbell. " This has nothing to do with the question as to the competency of " these charges of horning against the individual respondent.

" The bond is a common heritable bond granted by certain trustees " on the estate of Andrew Bell, of whom Mr Campbell was one. There " was nothing in it but the common obligation by the granters, as " trustees, followed by the conveyance of the heritable subjects in " security. If, on such a bond, any one trustee may be charged and " laid under caption, which was stated to be the fact here, for the " whole sum in the bond, the system of trusts, of such vast impor- " tance to the country, would speedily come to an end. It is beyond " all doubt, that there is no such personal obligation imposed by the " bond, on which any letters of horning could issue, sufficient to warrant " such a charge. The charger seems to be aware of this, and tries " to make out a personal responsibility in Mr Campbell individually, " and in the other trustees, on their acts and deeds, extraneous to " the bond. He may be right or wrong in this. He may have had " grounds for an action against them to make good his debt, if he " had failed in making it good by his bond, and for any damages he " thought he could claim. But this is not the point. Could he com- " petently charge Mr Campbell personally, and take personal caption " against him, for this as a personal debt of his? The proposition " appears to the Lord Ordinary to be absolutely untenable. The " charger had no warrant for letters of horning but the bond itself, " in which Mr Campbell is not personally bound at all. Although. " therefore, his grounds of claim against Mr Campbell personally, to " make good the debt — to guarantee the lands to be free of encum- " brances — to see the prior debt paid, &c. &c., were as clear as he " represents it, though of a very doubtful character, it would afford " no aid to his plea, for supporting the charge of horning. Such " claims require constitution by action. They require proof of the " facts averred, judgment on their relevancy, decree on the whole

" matter. Till there is such a decree, there can be no warrant for " any charge of horning which is to be supported on such grounds. " The bond and the decree of registration on it, have no such thing " in them. They rest on the simple obligation of the trustees, *qua* " such only. They make no personal liability in a single trustee. " And most especially, it is impossible to maintain, that when such " trustees grant an heritable bond as trustees only, the obligation " expressed in it imports a personal undertaking by each trustee, on " which the creditor may, on any loose and unproved allegations of " personal acts, be at once charged with horning for the whole debt, " however large, and put in prison till he pays it.

" Being thus of opinion, that the charge of horning was *funditus* " incompetent, the Lord Ordinary does not feel himself to be under " the necessity of considering particularly the charger's statements, " directed to the object of proving that the suspender had made him- " self personally liable for the debt. It might have been so found " in a proper action; though the Lord Ordinary doubts the soundness " of the whole views on which it is maintained. The charger does " not observe the importance of the fact, that his own accredited " agent was the chief actor in the whole affair, and far more deeply " engaged in it than he even alleges Mr Campbell to have been. " That he may have deceived the charger, his employer, is a possible " supposition. But all that took place, confessedly without Mr " Campbell's concurrence, had, at the least, Mr Bennett's sanction, " if it did not in fact entirely originate with him. The L.3000 was " put in his hands, or at his command, as the charger's agent. If he " let it be otherwise disposed of than it ought to have been, it is " rather hard that the charger, who had put his confidence in him to " negotiate the loan, should cast on Mr Campbell, who refused to " sanction Bennett's proceedings, the blame of what he did or " approved of. And besides this, the whole money was repaid to Mr " Bennett, and afterwards re-lent, without any authority by the " trustees.

" But these views are of no materiality to the point. The parties " are not in an action for making Mr Campbell liable for special " acts or undertakings. The Court have nothing to deal with but

" the charges and the suspensions; and these must and can only " depend on the bond.

" This state of the case entirely excludes any application of the " case of Thomson referred to, 24th June, 1829. No one can attach " more importance to the authority of that case than the Lord Ordi- " nary does. But, besides that it is essentially different in the special " facts and grounds of judgment, from any state of the case which " can be here assumed, its application is at once excluded by the " fact, that the question was tried in an ordinary action of constitu- " tion, and not in a suspension of a charge of horning on the bill. " It would have been a far more plausible proceeding in that case. " But it was not attempted. The process was an action, which ad- " mitted of proof of all manner of grounds of personal liability. That " has no resemblance to the present question, in the objection of " total incompetency.

" The charger says, that in a certain correspondence, the suspen- " der had abandoned the first suspension. The Lord Ordinary has " read the whole correspondence, and he is of opinion, that there is " nothing in it which can have the effect of rendering it incompetent " for Mr Campbell to proceed with the first suspension, under the " circumstances which occurred in April 1839. He sees, indeed, that " the whole matter had been on the eve of a complete settlement, " and probably would have been settled long before, but for certain " very trifling difficulties chiefly raised by the charger. It appears, " however, to have been fully known to the charger and his agent, " that the arrangement was of this nature, that Mr Campbell should " advance three-fourths of the sum required, and that Mr Spence " should advance the other fourth. This appears distinctly from the " terms of the deed of assignation, which had been actually signed by " the charger, and which is in favour of Mr Spence to the extent of " his interest; and it is farther proved by Mr Hunter's letter of the " 18th April 1839. Although, therefore, it is true, that, in the ex- " pectation of the settlement taking place, Mr Campbell had declared " his intention not to proceed with the suspension, it surely will not " follow, that, when upon the bankruptcy of Spence the charger re- " fused to settle it, unless Mr Campbell should take the whole debt

" upon himself personally, and forthwith executed a second incom-
" petent charge of horning, he should be obliged to submit to the
" first charge, while he was advised that his suspension was perfectly
" well founded. But after all, the discussion of this case has only
" been rendered necessary by the charger's having declined the
" apparently reasonable offer made by the suspender in the month of
" August.

" If the first charge was incompetent, the second must have been
" so. But separately, the second charge was, in the Lord Ordinary's
" opinion, manifestly incompetent, for the reasons briefly but clearly
" stated in the note of Lord Jeffrey, in passing the bill without
" caution. The first suspension did not proceed merely on the
" groundlessness or incompetency of the particular charge. It im-
" peached the bond as a ground of any charge against the suspender
" personally, and the horning as incompetent to sustain such a charge.
" That first charge included a demand of the whole principal debt.
" The second related to another year's interest. But the very basis
" of the diligence was under suspension by the first process; and,
" consequently, there could be no other similar process in virtue of
" it, while it so stood. It should have been altogether abandoned
" when the bill was passed.

" In this state of the cause, the Lord Ordinary can do nothing but
" decide it on its merits. He regrets that it should have been
" forced to this point. But there is no help for it, since the charger,
" exercising his undoubted right, insisted on its being so treated.
" But still there is no interest at all involved but the question of
" expenses. And the Lord Ordinary earnestly trusts, that, what-
" ever the charger may be advised to do in regard to that question,
" he will now accede to the offer of payment of the principal and
" interest of the debt, and consignation of whatever may be necessary
" to cover all claims of expenses in any result; and, without more
" hesitation, discharge the encumbrance to the purchaser; or other-
" wise, that he will consent to an arrangement with the purchaser for
" whatever consignation may be necessary."

The appellant reclaimed to the Inner House, (the Second

Division,) and on the 21st February, 1840, his reclaiming note was refused by an interlocutor, in these terms: — "The Lords "having considered the reclaiming note for Colonel Gordon, "with the proceedings, and heard counsel thereon, vary the in- "terlocutor complained of, in so far as it finds the second charge "incompetent, in respect of the previous suspension, but, *quoad* "*ultra*, adhere to that interlocutor, and refuse the desire of the "note: Find the suspender entitled to additional expenses, and "remit to the Lord Ordinary to proceed accordingly."

The opinions delivered by the Judges at pronouncing this interlocutor were as follow: —

Lord Justice-Clerk. — "The opinion I have formed in this "case is, that, looking to the principal finding of the Lord "Ordinary, as compared with the argument of the parties, I am "not prepared to alter that finding; but as at present advised, "I cannot concur with his Lordship that it was incompetent to "give a new charge for the accruing interest. But this is merely "a subsidiary point; the other finding is the main question; and "as to it I say, that if it was intended to proceed against these "individuals merely as trustees, and not, as the Lord Ordinary "says, 'against them personally and individually,' there should "have been no disguise about the matter, and there would have "been an end of this multifarious litigation; no doubt this was "the view now professed, and so it was stated in the answer to "the first bill of suspension, that it was *qua* trustees only that it "was intended to proceed against them; but after the bill was "passed the ground should have been clearly taken. For what- "ever correspondence may have passed, and though Mr Camp- "bell may have so conducted himself, or rather as it would be, "misconducted himself, as to become personally liable for the "amount of this loan, that may very well be found in an action, "but I can arrive at no such conclusion as that it can be done

" under a charge on this bond. The words of the Lord Ordi-
" nary are extremely guarded in the leading proposition of this
" interlocutor, and I have no doubt that it is a correct finding in
" point of law. Now that the money has been paid, the only
" question is as to expenses; but to get at that we are asked to
" find that this interlocutor is contrary to law. But even sup-
" posing, which I give no opinion upon, that there was a clear
" ground for making Mr Campbell personally liable for the
" money, that could not be got under this charge, and as this
" litigation has been encouraged by the other party not speaking
" out, he must just pay the penalty."

Lord Meadowbank. — " I entirely concur in the result at which
" your Lordship has arrived as to the first finding. I have,
" however, a little doubt as to the point on which your Lord-
" ship has differed from the Lord Ordinary. The first charge
" was for payment of the bond, it might be right or wrong, but
" the charge was suspended. It, therefore, appeared to me to
" be *res judicata* between these parties, and to stop any charge
" for future interest. It is different from a running charge for
" minister's stipend that only accrues from year to year, but here
" the bond, which was the very ground of the charge, had been
" previously suspended. As to the other point, your Lordship
" has said that this party had not spoken plainly enough as to the
" object of the charge; but I rather think that he shewed plainly
" enough that his object was to lay hold of these gentlemen
" personally."

Lord Medwyn. — " I cannot entirely concur with your Lord-
" ships. When a bond has been granted by trustees, and horning
" raised on the bond, and the parties charged as trustees, they
" may suspend on the ground that they have no trust-funds;
" and the very first statement in a suspension in such a case
" should be to that effect. The charger is not bound to call on
" them to make any statement as to the trust-funds; it is their

"clear duty to put it forward themselves. But I cannot take "the averment made by Mr Campbell in the bill, that he had "no funds in his hands as sufficient for this purpose; for although "he individually was not the factor for the trust, and had no "funds in his own hands, yet being a trustee, the funds in the "factor's hands were funds in Mr Campbell's hands, and he is "responsible for them. Then I can discover no statement by "him in the record that there are no trust-funds. His objec- "tion to the charge is on the ground of its imposing on him "a personal liability, and that Colonel Gordon may proceed "against the trust-funds. But when a charge is given to trustees "for payment of trust money, especially for repayment of money "borrowed by themselves for the trust, the only defence against "it is, that there are no trust-funds, and if this is not shewn, "then it is to be presumed that there are funds, and they must "pay. I perfectly concur with the Lord Ordinary, that if Mr "Campbell, or any other trustee, had, by any separate proceed- "ing, made himself personally liable for a trust-debt, and the "creditor wished to go against him personally, rather than "against the trust-estate, the claim must be constituted by a "separate action. But there is no attempt to make such a claim "here till the parties are otherwise in Court. Mr Campbell is "charged as trustee: he does not plead that he has no trust- "funds, but, on the contrary, makes an arrangement for paying "up the debt. I cannot, therefore, suppose how it can be held "that a party acting as the suspender has done, is entitled to "any part of the expenses of this litigation from the creditor.

"As to the other point, I concur with your Lordship that the "second charge was competent; I do not mean to say that the "party could go on, and that it was not to abide the fate of the "first charge. Here a suspension was presented, and the bill "passed, which was right. But still it was not incompetent to "give the charge and denounce, so as thereby to secure the

" benefit of accumulation of interest. The bond was not sus-
" pended *in toto* by the previous suspension."

The expenses of the respondent were subsequently modified and decerned for by the Lord Ordinary. The appellant reclaimed against his Lordship's interlocutor, but it was adhered to by the Court.

The appeal was taken against the interlocutors of Lord Moncrieff and the Court.

Mr Pemberton and Mr Jas. Anderson for the appellant. — The question in this case arises upon an heritable bond, and in the view which we take of the case, it will not be necessary to trouble the House except in regard to the degree of liability incurred by the parties to the bond *ex facie* of that deed. Other questions were agitated in the Court below, which are noticed in the interlocutor of the Lord Ordinary, and the opinions of the Judges, but the question to which we intend to confine ourselves, will, we apprehend, sufficiently dispose of the case.

[*Mr S. S. Bell for the respondent.* — Mr Pemberton will excuse me interrupting him to put the House in possession of the fact, that the principal debt and interest out of which this appeal has arisen, have both been paid, and that the appellant, whatever may be the judgment of your Lordships, cannot have any relief under this appeal, except as regards the matter of costs.

Lord Brougham. — Do you mean to contend, Mr Pemberton, that the costs are not entirely in the discretion of the Court, even supposing it to have miscarried on the merits?]

Certainly not, but your Lordships will observe, that the question raised by the appeal, involves the right of the appellant to the use of the particular execution. That, as your Lordships will perceive, involves a very important question; and behind it remains the question of the right of the respondent to damages,

if that execution has been improperly used, and as to this, he has already threatened the appellant with an action.

In the outset of the bond, the parties acknowledge receipt of the L.7000, without any qualification or reservation, and bind themselves to repay it. Accordingly, they consent in ordinary form, to registration of the deed, that execution may pass upon it. No doubt the words "as trustees" are used, but this was to describe the character of the parties — not to limit their liability. The only purpose of the clause of registration is to authorize diligence; the registration is equivalent to a decree with the consent of the party. If, then, execution be competent at all, it is difficult to discover how these words "as trustees" can make any difference as to the execution to which the trustees are liable. The writs may *ex figura verborum*, be directed against them as trustees, but it can only be against them in their proper individual capacities that they can operate, and whether a man be imprisoned as a trustee, or in his own capacity as an individual, it cannot matter to him. Here the writs were directed against the suspender as a trustee, and no objection was, or could be raised to them on that ground — they were in strict conformity with their warrant. Yet the interlocutor of the Lord Ordinary, adhered to by the Court, finds that there was no warrant in the bond for the issuing of the letters of horning. The respondent himself did not object to the charge of horning. His objection was, to farther execution founded upon the charge of horning, but if the parties had trust-funds in their pockets, how were these funds to be made available without personal diligence against the trustees to compel them to pay over? Unless this could competently be done, of what possible use could the personal obligation in the bond, and the clause for registration be?

[*Lord Brougham.* — The object may be to the end and intent to enforce payment out of the trust-fund.]

Just so, and the appellant was entitled to enforce the payment

in the mode pointed out by the bond, by diligence raised upon it, and he could not do it in any other manner.

[*Lord Campbell.* — If there were alleged not to be any trust-funds, might there not be an action of constitution ?]

Whether the appellant might have that, or any other mode of relief, we are not aware, but it would not be the remedy given by the bond. The parties had consented to execution being obtained upon the bond, without the necessity of action.

[*Lord Campbell.* — Suppose all the trustees who executed the bond had died; it does not bind the heirs and representatives of those who execute it ?

Lord Brougham. — I suppose the other party admits that this bond would bind the successors of these trustees, " such other " person or persons as might be assumed by them."

Mr Bell. — To the effect of binding the trust-estate in their hands.

Lord Campbell. — That is to say that there should be a due administration ?

Mr Bell. — Exactly.]

If any liability at all be admitted, whether the trustees are personally liable must depend upon the circumstances when you come to try against what the execution is issued. Unless the respondent can make out that there was no personal obligation of any kind, he must admit the liability of the trustees to personal execution, leaving it to them to discharge themselves of that liability by shewing that there were no trust-funds. That such a personal obligation was given, and intended for some effect, is shewn by those clauses of the bond which apply to the security given over the real estate, and to the power of sale for the purpose of making that security effectual.

But the notion of a distinction between individual liability to execution, and liability to execution *qua* trustees, is without foundation in the law either of England or Scotland; in the

Courts of England an attempt has frequently been made to raise such a distinction, but has always failed. Trustees are not under necessity to enter into obligations of this nature, and if they nevertheless do it, they must stand to the consequences. In Burrell *v.* Jones, 3 *Bar.* and *Ald.* 47, which was an action upon an undertaking in these terms, — "We, as solicitors to the "assignees, undertake to pay," the parties were held to be personlly liable, Justice Best observing, "the term, as solicitors, is "merely descriptive of the character they fill, and which has "induced them to undertake." In Appleton *v.* Binks, 5 *East*, 148, the party covenanted "for himself, his heirs, executors, &c. "on the part and behalf of the said Lord Viscount Rokeby;" and though he argued that he covenanted as agent for ord Rokeby only, yet the Court held that there was nothing against law if a party would bind himself for his principal. In Ball *v.* Storie, 1 *Si.* and *Stu.* 210, the plaintiff was relieved against a personal obligation for payment of money, solely upon the ground, that, by the defendant's own admission, it was through entire mistake that the obligation had been framed so as to impose any liability upon the party, the true intention having been, that he should execute the deed as an agent merely, and in such terms as to bind his principal only.

[*Lord Campbell.* — We have no such instrument as this bond in English conveyancing.]

But the principle for which we are contending has been also recognized in Scotland in the case of Thomson *v.* M'Lachlan, 7 *S.* 787, where parties who had granted bills as trustees of the late Colin M'Lachlan were found to be personally liable for their payment. So also in Thomas *v.* Walker's Trustees, 11 *S.* and *D.* 162, trustees who had sold a house through the medium of a factor, by whom the price had been received and misapplied, were found personally liable either to grant a disposition, or return the price. And again, in Gibson *v.* Pearson, 11 *S.* and *D.* 656, a

trustee was found personally liable for the expenses of a litigation carried on by him *qua* trustee.

The Solicitor-General and Mr Bell appeared for the respondent, but were not called upon.

LORD BROUGHAM. — I think we need not trouble you, their Lordships do not see any ground for altering the interlocutors complained of.

My Lords, The principal question here is with respect to the nature of the liability incurred under a bond given by the trustees of Andrew Bell; and I think, upon a careful view of the whole instrument taken together, and particularly the early part of it, the warrant of it must be taken to be confined to them in their character of trustees, and only to impose upon them a liability to the extent to which they were concerned in the trust fund.

Lord Cottenham. — I quite agree with the opinion which has been already expressed upon this case. The appellant having issued this process against the respondent, the respondent applies to him to know whether he intends to use it against him personally; the appellant's agent replies, and writes a letter, dated the 10th of January, in which he uses these expressions: — "You surely don't seriously tell me, that whatever be the state "of your accounts with Bell's trust, you are not bound to imple- "ment your obligation to Colonel Gordon, to repay to him a "sum which you acknowledge to have borrowed and received, "and bind and oblige yourself to repay; and the idea of holding "out a threat to deter him from following out the diligence to "which you consent, for enforcing implement of your obligation "in case of failure, is a very extraordinary one." There is a distinct statement. First, there is diligence issued, and upon application to know what use was intended to be made of it,

they at once say, We mean to make you personally pay out of your own funds, the money borrowed from Colonel Gordon. If the party had made use only of a threat, is that any ground for refusing a bill of suspension? The party sought to be charged was quite right in applying to the Court for a suspension from an improper use of the diligence, and accordingly, relief by a bill of suspension was applied for and obtained. Being of opinion that the bond did not warrant the party to proceed personally against the trustee, to compel him to pay out of his own funds that which is a charge upon the trust fund only, it appears to me clearly, that the party was endeavouring to make a use of the process beyond that intended, and that the party was quite regular in applying to the Court by bill of suspension. The Court were of opinion, and I think they were right in so holding, that an improper use was intended to be made of the diligence; and the mere question is, Whether the party is to pay the expenses of a proceeding to which he put his adversary, and which was rendered necessary, in order to prevent him making an improper use of the process of the Court. I think there is no ground for the appeal, and I think the Court was right in directing the bill of suspension to issue, and ordering the expenses to be paid by the appellant.

Lord Campbell. — I am of the same opinion. Unless the suspender was absolutely and personally liable to pay the L.7000, and interest, he was entitled to suspension. It is admitted he might lie by till the proper time for making the application, or that he had a right to come *quia timet.* Then is he absolutely liable? I am of opinion that the cases quoted do not apply where there is a limited liability. They are cases where the parties had contracted with the agent, the principal being liable. It is likewise different from the cases of bills and promissory notes. The truth is, that this instrument is quite unlike what we have in England; it is clear there was only a limited

liability, and not an absolute liability, *in solido*, for the whole of the advance. He takes care to state that he contracts in his character of trustee, in words which I need not repeat, treating the trustees as a body, like a corporation, avoiding personal liability; and therefore I think that he was not liable, and was entitled to the suspension. I am therefore clearly of opinion that the interlocutors ought not to be disturbed, and I move your Lordships that they be affirmed.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors, so far as therein complained of, be affirmed with costs.

BRUNDRETT, RANDALL, SIMMONS, & BROWN—RICHARDSON & CONNELL, Agents.

[24*th June*, 1842.]

JAMES REDDIE, and Others, Secretaries to, and acting on behalf of, the Trustees for Improving the Navigation of the River Clyde, *Appellants*.

JOHN TODD, and Others, Trustees and Representatives of Charles Todd, deceased, *Respondents*.

Jurisdiction. — *Suspension.* — Where there is a question, as to whether matter in dispute is within exclusive statutory jurisdiction conferred on an inferior court, suspension is competent without abiding the issue of the proceeding in the inferior court, and although a jury may even have been sworn to try the question.

Jurisdiction. — *Acquiescence.* — Matter not within exclusive statutory jurisdiction *held* not to have been brought within it by waiver of parties.

CHARLES TODD, the author of the respondents, was proprietor of land on the banks of the River Clyde, which he held of the Magistrates of Glasgow as his superiors. In 1833, he sold 2700 square yards of this land to Wingate, to be held of himself for payment of a ground annual of L.93, 18s. In 1837, he sold Wingate another portion, of 3865 yards, adjoining the river, to be likewise held of himself for payment of a yearly feu-duty of L.222, 19s. 9d. The conveyances of these portions were made with a clause of absolute warrandice, by Todd.

After the date of these conveyances, the appellants claimed a portion of the land included in the last mentioned conveyance, as additions to the original banks of the river, created by their operations on the bed of the river, and raised an action for substantiating this claim, which lay over to abide the issue of another similar question betwen the appellants and the respon-

dents, in regard to the portion of land which had not been disposed of by Todd.

The powers under which the appellants acted in their operations on the navigation of the Clyde, were derived under several statutes, the last of which was the 3d and 4th Vict. cap. 118.

By the 11th section of that statute, the appellants are empowered to perform certain operations, "And for these purposes to enter upon, take, occupy, and use the several and respective lands, tenements, or other heritages upon, through, or adjoining to which the same are intended to be made, carried, executed, or constructed, within the boundaries or lines of works delineated on the said map or plan, or within the limits of the after-mentioned deviation."

By the 24th section of the act, upon the narrative that questions had been, and might be raised, "in relation to the rights of individual proprietors of lands along the banks of the said river," (other than certain proprietors therein referred to,) "to compensation for ground or other heritages partly comprehended within the lines of operations delineated on the said map or plan, and situated within the former water-way, or alveus or channel of the said river," it is enacted, "That nothing herein contained shall be held to affect such rights to compensation as may legally belong to such proprietors, provided always, that in the event of the said trustees finding it necessary, in the meantime, for the public advantage, or for the accommodation of the shipping resorting to the said river and harbour, to take possession of any part or portion of such ground or other heritages under this act, before the settlement of the said questions, or of such legal processes as may be instituted in relation thereto, the said trustees may apply by petition to the Sheriff of the county in which such grounds or heritages are situated, setting forth this act, and the existence or dependence of such questions, and craving the said Sheriff

" to grant warrant for summoning the parties interested to " appear, upon reasonable *inducicæ;* and the parties being so " called, the said Sheriff shall proceed to fix and determine, by " competent evidence before a jury to be impannelled in manner " hereinafter provided, the relative boundaries of the particular " and respective portions of such ground or other heritages for- " merly within the water-way, or alveus or channel of the said " river, distinguishing the ground or embankments so situated " from the lands lying beyond or not within the said former " water-way, alveus, or channel; and the respective grounds " before mentioned having been so ascertained, and accurately " defined and laid down on a map or plan thereof, the said " Sheriff and Jury shall forthwith inquire into, assess, and fix, " by the verdict of a majority of the number of the said jury, the " true and just value of the portion in question of the said " grounds or shores comprehended within the lines delineated on " the said map or plan, and situated within the former water- " way, alveus, or channel of the said river; which verdict shall " be subscribed by the foreman of the said jury, and by the said " Sheriff, and shall be final and binding on all parties as to the " value of such grounds, shores, or embankments: And in the " event of the applications or petitions to the Sheriff before " mentioned embracing any part of the land or heritages " belonging to the said proprietors, not within the former water- " way, alveus, or channel of the said river, the verdict of the said " jury shall distinguish the portion of the lands or heritages so " situated, and the price or value thereof, from the ground or " shores now or formerly within the said water-way, channel, or " alveus, in order that the price or value of the said lands or " heritages may be paid over to the proprietor thereof, or other- " wise disposed of in manner herein after enacted in cases of " taking property generally under the present act."

By section 25th it is farther enacted, " That upon the said

" trustees consigning or paying into any of the banks in " Scotland established by act of Parliament or royal charter, " the sum or sums of money that may be so assessed and " fixed by the verdict of such jury as the true and just value of " such grounds or embankments situated within the foresaid " water-way, alveus, or channel, in order to abide the final issue " and determination of the questions before mentioned, or such " legal proceedings as may be adopted in relation thereto, the " said trustees shall be entitled immediately thereafter to take, " occupy, and use such grounds or embankments for the pur- " poses of this act."

By section 92, it is enacted,—" That the rights and titles " to be granted in manner before mentioned to the said trus- " tees, to the premises therein described. shall not in any " measure affect or diminish the superiority of the same; " but notwithstanding such conveyances, the superiority shall " remain as before, entire in the persons having right to the " same."

By the 94th section it is enacted, " That in case the price or " value to be paid for any lands, tenements, or other heritages " taken or used for the purposes of this act," should not be adjusted between the parties, " or in case the proprietor or per- " son shall not produce and evince a clear title to the premises " in dispute, or to the interest which they claim therein, to the " satisfaction of the said trustees;" or if the said trustees should, for one month after notice " by any proprietor or occupier of, or " persons interested in any lands or heritages taken or used for " the purposes of this act," neglect or refuse to treat with him, or not agree with him, then he should be empowered to make application to the Sheriff of the county for the purpose of having the price or value ascertained by the verdict of a jury; and the Sheriff shall then summon a jury, and " inquire into, assess and " fix, by the verdict of a majority of their number, the sum

" of money to be paid for such lands or heritages as aforesaid, " and such Sheriff shall give judgment for the purchase-moneys " or recompense assessed by such jury; which verdict, and the " judgment thereupon, shall be signed by such Sheriff, and " shall be binding and conclusive to all intents and purposes " against all bodies politic, corporate, or collegiate, and all other " persons whomsoever, without being subject to reduction, advo- " cation or suspension, or to any question or review in any way " whatsoever."

In the schedule annexed to the act, specifying the " owner or " reputed owners, either claiming an absolute right of property " in the lands," &c. " or as adjacent proprietors claiming a right " to, or interest in, the ancient or modern alveus of the river," the name of Charles Todd occurred as " superior," and Thomas Wingate as " feuar," and also as occupier of " part of the river " bank, chiefly covered with rubbish."

On the 17th September, 1840, the appellants, by their secretary, addressed a letter " To Messrs Thomas Wingate, Engineer " and Founder, Glasgow, and to Messrs John Todd," &c. " trustees " and representatives of the deceased Mr Charles Todd," in which the writer, after stating the statutory powers, continued, — " I " offer to you, the trustees and representatives of the said Charles " Todd, for all right, property, and interest, belonging to you " in the machine-work, dwelling-house, and grounds, forming " parts and portions of the lands of Springfield, or grounds ad- " jacent thereto, on the south side of the said river, as the said " machine-work, dwelling-house, and grounds, are included " within the Parliamentary lines of improvement of the said " river and harbour, and as the same are marked No. V., No. " VI. and No. VII., and delineated on the plan which accom- " panies these presents; which plan is subscribed by me as rela- " tive hereto, the following sums: — That is to say, the sum of " L.1025 sterling, for lot marked No. V., before mentioned, to " be consigned in bank, until the ownership of the said ground

" shall be ascertained, as directed by the said Act; and the sum " of L.4000 sterling, for lots No. VI. and No. VII., before " mentioned, to be paid agreeably to the provisions of the " said Act; and I hereby offer to you, the said Thomas Win- " gate, the sum of L.50 sterling, for all right, property, and " interest, belonging to you in the said lot marked No. V. to " be consigned as aforesaid, and the sum of L.2175 sterling " for all right, property, and interest belonging to you in the " said lots marked No. VI. and VII., to be paid as aforesaid: " Declaring always, that these offers are made on the express " condition that, on payment or consignation being made of " the said sums, as directed by the said Act, you, the trustees " or representatives of the said Charles Todd, and the said " Thomas Wingate, shall be bound to deliver to the said trustees " a clear and unexceptionable title to the said subjects, and to " remove and discharge all burdens and encumbrances of every " kind affecting the same, excepting such right of superiority " over the said subjects as may belong to the city of Glasgow, " and the feu-duties or other prestations payable to the said city " as superiors thereof, and also excepting such provisions, restric- " tions or servitudes, conventional or legal, as may be constituted " over the said subjects by the original feu-rights, granted by the " said city of Glasgow, or which may be attached to the said " subjects at common law."

This letter concluded by giving notice that, in case the offer were not accepted, " and a clear title to any right, property, and " interest, legally belonging to, or claimed by you, respectively, " given," proceedings would be taken under the statute, for having the value ascertained.

The offer was not accepted, and the appellants then served upon the law agents of the respondents the notices required by the statute, with a view to having the value assessed, the agents having by letter agreed to accept of such service.

Thereafter the appellants presented a petition under the statute

to the Sheriff, in which, after setting forth their offer, and its refusal, and the existence of the actions in regard to a part of the ground required by them, which have been already noticed, they prayed the Sheriff, among other things, to empanel a jury to determine by their verdict, "the boundaries of the water-side "ground, which is at present the subject of litigation in the "foresaid action of declarator, and the value of such disputed "ground, in order that the same may be consigned until the "ownership of the said ground shall be ascertained and deter-"mined, and to fix the amount of compensation which may be "due to the said Thomas Wingate, and to the trustees or re-"presentatives of the said Charles Todd respectively, for the "said disputed ground, in the event of their ultimately obtaining "a judgment in their favour in the said action, all in the man-"ner directed by the last recited Act; and also to determine, by "the verdict of such jury, the sum or sums of money to be paid "by the said parliamentary trustees to the said Thomas Win-"gate, and to the trustees or representatives of the said Charles "Todd, as the amount of compensation due to them respectively "for the remaining portion of the subjects above described, "according to their respective rights and interests therein, all in "terms of the said recited Acts; and upon the boundaries and "value of the said subjects being fixed and ascertained in man-"ner foresaid by the verdict of the said jury, to pronounce judg-"ment in terms thereof, and of the said statutes, and to decern "and adjudge the said subjects to belong to the said parliamen-"tary trustees in all time coming, upon their consigning the "value of the said disputed ground, and making payment or "consignation of the value of the remaining subjects, to be ascer-"tained in manner foresaid."

On the 19th October, a minute was signed by those acting on behalf of Wingate, and the appellants and respondents, which was in these terms:—"It is mutually agreed that the trials in

" the above cases are to take place on a day or days to be " arranged by the counsel for the parties, not later in all the " three cases abovementioned, the petitions of which are now " marked by the Sheriff, than the 10th of January 1841, all " preliminary objections to these trials in point of form being " hereby departed from by the defenders; and that in the cases " of Higginbotham and Todd's Trustees, in reckoning the six " months within which their cases must be tried, as provided for " in the statute, the period from this date to that of the trial " shall not be reckoned, and that in the mean time examinations " of havers may proceed to prepare productions for the trials, " and reserving to the Clyde Trustees, in the intervening period " before the trials, to apply to the Sheriff for a judicial inspec- " tion of the works for which value is claimed, by proper per- " sons, in the event of access to them being refused by the de- " fenders, and to the defenders their objections thereagainst, and " reserving to the trustees to present their petitions for trial in " such order as they shall think fit, and to the defenders their " objections thereagainst."

On the 5th December, 1840, the counsel for the parties signed this farther minute, — " It is hereby agreed that the trial " of Wingate is to be fixed for Friday the 25th of December, " Higginbotham's to be fixed for Monday the 28th, and Todd's " case to follow it. The jury for Todd's case to be cited for " Wednesday the 30th."

The Sheriff, on the application of the appellants, without ordering answers to the petition, fixed the trials for the 25th December, and granted commission for examination of havers. This commission was joined in, both by the appellants and respondents, who respectively examined havers under it.

On the 25th of December, 1840, counsel and agents appeared for the appellants and respondents respectively, and separate counsel and agents appeared for Wingate. Before the jury were

called, Mr Robertson, counsel for the respondents, stated, that, on the part of the trustees, he maintained that it was not competent for the petitioners, under the statutes founded on, to compel a party in the situation of a superior or owner of feu-duties or ground-annuals, to sell the feu-duties or ground-annuals due to him, or any other of his rights as superior or owner of feu-duties or ground-annuals, and that there was no jurisdiction under which proceedings for a valuation and sale of said feu-duties, ground-annuals, or other rights could competently be taken; and on behalf of the said trustees who were the superiors of Mr Wingate in the ground forming the subject of the petition, or owners of feu-duties or ground-annuals arising thereupon, he craved that the petition should be dismissed *quoad* the trustees with expenses, or that a judgment should be pronounced, finding and declaring that the feu-duties, ground-annuals and other rights belonging to the said trustees, as superiors aforesaid, or as the owners of feu-duties or ground-annuals arising from the said ground, should not be made in any view the subject of the present proceedings.

The Sheriff repelled the objection.

Whereupon Mr Robertson intimated the intention of the trustees to advocate this judgment, — tendered a bond of caution, and craved the Sheriff in the meantime to stay farther proceedings.

The Sheriff refused leave to advocate.

Whereupon Mr Robertson for the trustees, (the respondents,) without prejudice to his right to complain of the foregoing judgments, moved that the Sheriff should separate the cases of Mr Wingate and of the trustees respectively, and appoint them to be tried separately.

The Sheriff refused, in respect no special cause was shewn for the separation.

The jury were then called and sworn: a view was ordered, and farther proceeding was adjourned until next morning.

The respondents, in the meanwhile, presented a note of suspension to the Lord Ordinary on the bills, accompanied by a statement, which, after setting forth the procedure which had taken place before the Sheriff in regard to their objecting to the competency of the procedure, but without noticing the previous concurrence of the parties, continued thus: — "The Sheriff repelled the objection stated by the complainers, held his own "jurisdiction to be good in the matters in question, and appointed "the trial to proceed, to the effect of not only assessing the "value of the property, but also of the rights of superiority, feu-"duty and ground-annual belonging to the complainers; the "said trial to be proceeded with on to-morrow the 26th day of "December 1840.

The pleas in law on which the respondents supported their note were, — "I. The trustees of the River Clyde have no right, "by virtue of the statutes under which they act, to take from "any one, or to enforce a compulsory sale of feu-duties, ground-"annuals, or rights of superiority, their whole right being con-"fined to property merely, leaving the whole rights of superiority "unaffected. They have, therefore, no right to insist in, or "carry on, statutory proceedings for a valuation and sale of feu-"duties, ground-annuals, or rights of superiority. Nor is there "any jurisdiction in the Sheriff to order or sanction such pro-"ceedings."

"II. The said trustees wrongfully going on to take proceed-"ings of the description before stated, the complainers are "entitled to have suspension and interdict against them as "craved."

The Lord Ordinary granted interim interdict upon the note of suspension, which was intimated to the Sheriff and the appellants on the morning of the 26th; and the appellants refusing to proceed with the trial as against Wingate alone, which the Sheriff allowed them to do, the Sheriff discharged the jury, and reserved all questions as to expenses.

The appellants, on the same day, presented answers to the note of suspension and statement of the respondents, wherein they set forth, that "after the trial had commenced on the "25th instant, the suspenders, for the first time, raised the "objection which forms the subject matter of the present "complaint."

The pleas in law upon which the appellants rested their case were: —

"I. The suspenders ought not now to be allowed to raise and "maintain their present objection, to the effect of delaying or "obstructing the begun trial, more especially as proceeding with "the trial cannot, according to their own view, ultimately pre-"judice the suspenders' alleged right.

"II. The suspenders' objection is not well founded, according "to the sound construction of the statute, but is plainly excluded "by the statute.

"III. The suspenders' note ought, therefore, to be simpliciter "refused, or at least the interim interdict granted ought to be "recalled, so as to allow the trial to proceed."

On advising the papers, and hearing counsel, the Lord Ordinary pronounced the following interlocutor: — "26th December, "1840. — The Lord Ordinary having considered the note of "suspension and answers, and heard counsel, at the request of "parties, in respect that the complainers admit the right of the "respondents to enter upon the several lands, tenements, or "other heritages in question, for the purposes of the act; as "also that the trials shall proceed so far as regards the pro-"prietors, occupiers, or persons interested in any such lands or "heritages, with the exception of the rights of superiority, which "it is enacted that the said statute shall not in any measure "affect or diminish, but that the same shall remain as before, "entire in the persons having right thereto, — And in respect "that the valuation of the said rights of superiority so reserved

" does not fall under the statute, passes the note and continues " the interdict."

The appellants then presented a note, in which they craved a sist of procedure to allow them to lodge a reclaiming note, and on the 28th December, the Lord Ordinary granted the sist asked, adding the subjoined note to his interlocutor.

" *Note.* — The Lord Ordinary considers the construction of this " act of parliament a matter of some importance, although it is one " on which he felt no doubt. Two rules have been applied by courts " of justice in the construction of acts of parliament, which take away " individual rights of property, in order to attain some improvement " of a public nature, 1st, That they should be construed liberally, so " far as regards the object in view; 2dly, That they should be con- " strued very strictly, and favourably to those who appear for private " rights, where it is not necessary to take away those rights with a " view to the contemplated operations. In this case there is an " express clause reserving all rights of superiority in very strong " terms, and those who appear for the superiors did not object to " every thing being taken possession of that the Clyde trustees " require for improving the navigation, and to the trials proceeding, " in order to value any such rights; but they maintained that the " rights of superiority, which were expressly reserved, did not fall " under the operation of the statute. Whether, therefore, the general " objects of the statute, or the particular clauses which were brought " under the Lord Ordinary's view were regarded, there was no " ground for holding that the rights of superiority were in any " measure to be affected, or made the subject of trial under the " statute. On the other hand, there seemed no reason why the trial " should not proceed, so far as regarded all rights of property and " possession belonging to the vassals or other persons."

The appellants then presented a reclaiming note, and on the 19th February, 1841, the Court pronounced the following interlocutor: — " The Lords having advised this reclaiming note, and

" heard counsel for the qarties, recal, *hoc statu*, the reasons set " forth in the interlocutor complained of; but, *quoad ultra*, " adhere to the said interlocutor, and refuse the prayer of the " reclaiming note."

The appeal was against the interlocutors of the Lord Ordinary and the Court.

Mr Pemberton and Mr Thesiger for the appellants. — I. The proceeding which was taken by the respondents to stop the trial was wholly incompetent upon three grounds, — 1st, Supposing it to have been competent for them to interrupt the proceedings at the particular stage at which they intervened, advocation was the proper remedy; suspension being the mode, not of bringing up inchoate proceedings to the superior Court, but of preventing execution upon the decree of the inferior Court, after it has been given, *Ersk.* IV. 2. 40: the statute 50 Geo. III. cap. 112, sec. 36, specially makes advocation the mode of complaint where, as in this case, the matter of it is " incompetency, including " defect of jurisdiction." And so in Buchanan *v.* Lumsden, 15 *D.* and *B.* 960, it was held, that, prior to extract, advocation is the proper mode of procedure.

[*Lord Cottenham.* — All these authorities apply to cases before the inferior courts according to the ordinary forms. The statute here makes the proceeding very different, and gives most rapid execution.

Lord Campbell. — In these cases the court that grants advocation can do all that the inferior court could do.]

2d, But at all events, after the jury had been sworn, and charged with the matter in dispute, and were bound to discharge themselves by a verdict, it was wholly incompetent to interrupt the procedure by any course whatever, whether by advocation or suspension. The authorities upon this subject in the law of

Scotland are few, but the objection is rested upon principles of expediency common to all rules in administering justice, and the cases in England are numerous in support of it; Lismore *v.* Beadle, 1 *Dowl.* N. S. 566; Lawrence *v.* Wilcock, 11 *Ad.* and *Ell.* 941; Lycett *v.* Tenant, 4 *Bing.* N. C. 168. No possible inconvenience or injury could have been sustained by allowing the jury to give their verdict, as after they had done so, relief would still have been open by suspension.

[*Lord Campbell.* — I suppose, upon receiving the notice in the letter of 17th September, 1840, they might have applied by suspension?]

We apprehend so. And, 3d, Even if the proceeding were unobjectionable upon the grounds stated, the respondents were precluded from taking it by having accepted the notice of intention to proceed under the statute, and by having concurred in all the proceedings throughout to the moment of the jury being about to be sworn. This concurrence they entirely concealed in their application for the suspension. Proceeding by interdict is strictly analogous to injunction by the Courts of Equity in England; and it is an established and every day recognized principle of these courts, that a party wilfully suppressing part of his case, shall not obtain the interposition of the court, or be allowed to sustain his injunction, if he may have obtained it.

[*Lord Chancellor.* — But the Court below, taking the statement you gave them, disclosing what you say had been concealed from the Lord Ordinary, still say we see no ground to disturb the interdict.]

II. The entry of Todd's name, in the schedule to the statute, as superior, and of Wingate's as vassal, shews distinctly, that the rights of Todd, as superior, were intended to be comprehended within the terms of the statute. But independently of this, rights of superiority must come within the interests which the appel-

lants are empowered to purchase. If they could purchase only the title of vassals, their purchase would be liable to be defeated at any time. The portion of ground required by them in this instance was small in extent, but it may be a part of a much larger portion, which is subject to a variety of mid-superiors, and to payment to them of feu-duties exceeding by ten times the value of the *dominium utile* of the lands taken by the appellants. For these feu-duties the mid-superiors will have a claim paramount to any right which the appellants can acquire.

The statute intended to give power to purchase every pecuniary interest, and all that was meant by the reservation in the 92d section was a reservation of the rights of franchise and other like rights, collateral to that in the land itself, existing in the crown vassals, or subject superiors.

Mr Solicitor General and Mr Kelly, for the respondents, were not called upon.

LORD CHANCELLOR. — We are not called upon in this proceeding to pronounce upon the construction of the act of Parliament, but if we entertain reasonable doubt upon what that construction is, and we do entertain that doubt, then we are called upon to consider the other point. If the question with respect to the construction of the act of Parliament were clear, and the Sheriff had no jurisdiction to proceed in this case, his proceeding not being warranted by the act of Parliament was not a valid proceeding, and if so, then the whole is illegal. I am of opinion that the party had a right under such circumstances to apply for a suspension, and therefore I, for one, am of opinion that this judgment ought to be affirmed.

Lord Cottenham. — With regard to the right of the party to apply to the Court of Session to interdict the Sheriff from proceeding to assess the damages, that is beyond all doubt. The

only objection made that is really worthy of consideration is, whether the parties are to fail in their application because they have not made it sooner. Now, it appears that there is no doubt they had notice of what the Trustees of the Navigation intended at an early period, when they took the course of applying to the Sheriff; and the question is, whether the matter having proceeded so far, it should have been left to the assessment of the Jury, the Sheriff having decided against the respondents. It certainly would have been better if the party objecting to the value of the superiority being assessed, had previously applied to the Court of Session; but I think that if they were entitled to apply, there is nothing in the objection of their having applied so late, arising out of the circumstance of the Jury having been summoned. If the Sheriff had no jurisdiction in the matter, the proceeding which took place would have been informal. If we were now to reverse the order of the Court of Session, the effect of that would not be very beneficial to either party, because the question remaining to be discussed as to the discharge of this order, farther proceeding before the Sheriff would be followed by an immediate application for another order. I am of opinion that there is no sufficient objection to the course which has been taken.

Lord Campbell. — I think it was highly proper that this question with regard to the construction of the act of Parliament should be raised; and I think, certainly, that the application by suspension was the proper mode of doing that. My only doubt is, whether the respondents have not precluded themselves by their acquiescence. There was a notice on the 17th of September, and again on the 19th of October, that a jury should be summoned to assess, and they certainly might then have given the other party notice of the application intended to be made to the Court of Session. At the same time I agree in that which has been said, that we are now to suppose there is a question whether there was jurisdiction; and if there were no jurisdiction, then no

jurisdiction can be conferred, and it would be too late to make the application for the interposition of the superior Court, after the assessment by the jury. On these grounds, I think that the interlocutory judgment ought to be affirmed.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

RICHARDSON & CONNELL — ARCHIBALD GRAHAME, Agents.

[11*th July*, 1842.]

JAMES CORBET PORTERFIELD, Esq. *Appellant.*

NATHANIEL GORDON CORBET, Esq. *Respondent.*

Passive Titles, 1695, cap. 24.—The receipt and payment over of rents by a factor, under an agreement between parties holding competing brieves for service of heirs, that the factor should draw the rents and divide them between the parties during the competition, *held* sufficient to establish possession in apparency by the party ultimately successful in the competition, who died before having made up his title, so as to subject the next heir making up his titles by passing him over, in liability for his debts on the passive title of the act 1695.

Acquiescence. — *Implied Discharge.* — Dealings by a party who claimed under a trust-disposition and settlement by his father, executed to supply the place of a bond of provision, in case the bond should become ineffectual, on the erroneous supposition that the bond was invalid, *held* not to preclude the party from recurring to the bond, on being better advised as to its validity.

BOYD PORTERFIELD possessed the lands of Duchal under a strict entail, which gave the heirs in possession power to provide for their wives and younger children, in these terms: — "Excepting always furth and from the said clause irritant, full "power and liberty to the said William Porterfield, in case of "the decease of the said Julian Steill, his present spouse, before "him, and to the heirs-male of his body, and the other heirs "and members of tailzie above mentioned, to grant liferent "infeftments to their ladys or husbands, in satisfaction to them "of all terces and courtesies (from which the ladys and husbands "of the said heirs are hereby altogether secluded and debarred)

" of the saids lands and others foresaids, not exceeding one-third " part thereof, so far as the same is free, unaffected for the time " with former liferents, or real debts, and after deduction of the " annualrent of the personal debts that may affect the same; and " also, excepting and reserving furth and from the said clause irri- " tant, full power and liberty to the said William Porterfield, and " the heirs-male of his body, or the other heirs-male of the body " of the said Alexander Porterfield, or the other heirs of tailzie " above mentioned, to contract and take on debts for the provi- " sion of their younger children, not exceeding three years' free " rent of the lands and others foresaids, after deduction of life- " rents and real debts, and the annualrent of personal debts; " and also to contract and take on for just and necessary causes " the sum of 6000 merks therewith, at least with as much of the " said 6000 merks as shall be uncontracted, and the estate not " affected with for the time, so that the debt to be contracted by " them, and wherewith they may burden and affect the said " lands, shall never exceed 6000 merks at any one time, and three " years' free rent of the lands and others foresaids, after deduc- " tion of liferents and real debts, and the annualrent of personal " debts."

Boyd Porterfield, during his possession, executed the reserved power, by granting a bond in favour of his younger children, for L.2400, payable on failure of heirs-male of his body.

In 1815, Alexander, the surviving son of Boyd Porterfield, died after the term of Whitsunday of that year, having possessed the lands as his father's heir. On this event Colonel Porterfield purchased brieves for serving himself next heir of entail, and entered into possession of the lands. At the same time Stewart purchased competing brieves for serving himself heir of entail.

On the 4th October, 1816, Colonel Porterfield executed a bond, reciting the entails, and the power of provision thereby

reserved to the heirs, and continuing thus, "and whereas I am "heir of entail to the said lands, and am desirous of making a "proper provision for my younger children, therefore I, the said "James Corbet Porterfield, do hereby bind and oblige myself, "and the heirs of tailzie succeeding to me in the said entailed "lands and estate of Duchal and others, to content and pay to "Nathaniel Gordon Corbet, my second son, and to Laura "Corbet, my only daughter, being the two younger children "procreated of the marriage between me and the deceased Laura "Gordon, my spouse; All and Whole, three years' free rent of "the foresaid entailed lands and estate of Duchal, as the same "shall stand and be ascertained for the crop and year previous "to my death, and that in the proportions following, viz.," &c.— "with a fifth part of each instalment farther of liquidate penalty, "damages and expenses, in case of failure, and the lawful in- "terest thereof, from and after the terms of payment aforesaid, "aye and until the same be paid. But providing and declar- "ing always, as it is hereby expressly provided and declared, "that the provision hereby constituted in favour of my said "younger children, shall be effectual, and take place only in so "far as the same is consistent with the conditions and limitations "specified in the said deeds of entail, and with the powers "thereby vested in me; and, if the same shall be found discon- "form to the foresaid deeds of entail, it is declared, that the said "provision shall be restricted, and it is hereby accordingly re- "stricted, so as to be precisely conform to the powers given by "the said deeds of entail, and no otherwise; which provision "before written in favour of my younger children, shall be in "full to them of all portion natural, bairn's part of gear, exe- "cutry, or any other thing whatever, which they, or either of "them, can ask or claim, in and through my decease, in any "manner of way; and I hereby reserve to myself full power and "liberty at any time of my life, and even on deathbed, to alter,

" innovate, or cancel these presents, in whole or in part, as I may " see cause; and I dispense with the delivery hereof, and de- " clare the same, though found lying by me, or in the custody of " any other person to whom I may intrust the same undelivered " at the time of my decease, shall have all the effect of a delivered " evident, any law, practice, or custom to the contrary notwith- " standing." This bond was never delivered by the granter to either of the parties in whose favour it was made, but was found in his repositories at his death. At the date of this bond, the bond by Boyd Porterfield, and provisions by the other heirs of entail, of the aggregate amount of about L.6000, were subsisting, and they remained undischarged at the time of the Colonel's death.

On the same 4th October, 1816, Colonel Porterfield executed a trust-disposition and deed of settlement, which proceeded on this recital, — " Considering that whereas I have of this date " executed a deed of settlement in favour of my younger chil- " dren; binding my heirs of tailzie, in the lands and estate of " Duchal, to make payment to them of three years' free rent of " the said entailed estate, payable in the proportions, by the in- " stalments, and at the terms therein mentioned, as the said deed " in itself more fully bears. And whereas it may hereafter be " found that the said deed is invalid and ineffectual in law, for " securing to my younger children the provision therein con- " ceived in their favour, it therefore becomes necessary for me " to provide against that contingency, by securing for them a " suitable provision, out of my other means and estate: There- " fore, and for the paternal love, favour, and affection, which I " have and bear to my whole children after named, and for other " good and onerous causes me moving, (and in the event of the " deed of settlement before narrated not proving effectual for " securing to my younger children the provision therein con- " ceived in their favour.)" This deed conveyed to trustees the

whole real and personal estate of which the maker should die possessed, in trust to pay his debts, and, "next, in payment to "Nathaniel Gordon Corbet, my second son, of the sum of "L.4000 sterling, and to Laura Corbet, my only daughter, "of the sum of L.1000 sterling, which sums shall bear interest "from and after my decease, and shall be payable as soon there-"after as my trustees conveniently can. And, lastly, to pay the "residue of my said subjects to James Corbet, my eldest son, "which provisions before written in favour of my said children, "shall be in full to them of all portion natural, bairn's part of "gear, executry, or any other thing whatever, which they, or "either of them, can ask or claim, in and through my decease, "any manner of way."

On the 28th October, and 4th November, 1816, Colonel Porterfield, and Stewart, executed an agreement, which, after reciting the competition then going on between them, continued thus, — "And farther, considering that the said parties, soon "after the commencement of these actions, concurred in appoint-"ing William Campbell, writer in Johnston, as factor for uplift-"ing the rents of the said entailed estates, falling due during the "dependance of the foresaid actions, which rents he was ordered "to lodge in a bank, there to remain until the conclusion of the "said actions, and until it should be finally determined by the "Court of Session, or by the House of Peers, in the event of an "appeal being taken, which of the said parties had right to the "entailed estate, and that in virtue of the said letter of factory, "the said William Campbell has uplifted one half year's rents "of the said entailed estates, being the last half of crop and "year 1815, which by the tacks is payable at Whitsunday last, "and will be ready to uplift another half year's rent at Martin-"mas next, being the first half of crop and year 1816. And "as the final decisions of the said processes may not take place "for some time." On this recital the parties "agreed, and do

" hereby agree, that the rents collected at or since last term by " the said William Campbell the factor, after deducting all feu- " duties, public and parochial burdens, repairs of houses, and " other necessary outlays on the estate, and the incidents and " charges of the factor, &c., proper fee for his trouble, shall be " immediately paid and divided between the parties equally; and " for this purpose, that an account of the said rents and charges " shall be made out, of which two duplicates shall be docqueted " by both parties, and that each party shall grant to the factor " a receipt annexed to one of the duplicates for his share of the " free proceeds, which two receipts shall be a sufficient discharge " to the factor, who shall not thereafter be liable to be called to " account by either of the parties, or his heirs, for the rents so " settled and discharged; and that on uplifting each half year's " rent in time to come, during the dependence of the said pro- " cess of competition of brieves in the Court of Session, and until " the final decision thereof in the said Court, the accounts shall " be made out, docqueted, settled, and the free proceeds paid " and discharged in the manner before specified, until the final " decision of the said competition of brieves in the Court of " Session; but in case either party shall take the same by appeal " to the House of Lords, then this agreement shall cease, and " the rents shall be collected, as may be then agreed on by the " said parties, or by order of the Court of Session, and the suc- " cessful party and his heirs shall have no claim against the losing " party for any part of the bygone rents which may have been " divided, or declared subject to division by this agreement, but " each shall retain his share thereof, whatever may be the decision " of the cause in the Court of Session, and each party for him- " self and his heirs hereby renounces and gives up all claim for " repetition of any share of the bygone rents from the opposite " party, in so far as the same are divided or subject to be divided " at the final decision of the Court of Session, and both parties

" farther agree, that the successful party shall not demand from " the Court of Session any decree for expenses of process against " the losing party, but that each shall pay his own expenses of " process, in so far as may be incurred in the Court of Session. " Moreover, the parties farther agree, that in the event of the " death of either of them during the dependence of the foresaid " competition of brieves, and before the same is brought to a " final decision in the Court of Session as before specified, then " this agreement shall cease and be at an end as to any rents to " become payable by the tacks subsequent to the death of either " of the parties, but the same shall continue binding and effectual " as to the term's rent payable by the tacks, at the term immediately " preceding the decease of either of the parties, whether the same " be actually divided at that time or not, and as to all preceding " terms' rents; and the heir of the party deceasing shall not be " entitled either to call upon the factor, or upon the surviving " party, to account for the share of the bygone rents." The eldest sons of both parties were consenters to this agreement; the appellant being the eldest son of Colonel Porterfield. The rents of the entailed lands which fell due at Whitsunday, 1816, were paid to the executor of Alexander Porterfield, as he had survived that term. The subsequent rents were received and applied under the terms of the above agreement.

In October, 1818, Colonel Porterfield died, while the competition with Stewart was as yet not finally decided. The appellant then purchased brieves for serving himself heir of entail to Alexander Porterfield, the heir last infeft, and the litigation was resumed at the point at which it was left off on the death of his father. In May, 1821, the Court finally preferred him in the competition, and this decision was affirmed on appeal.

On Colonel Porterfield's death it was found that he had not left funds sufficient for the discharge of his debts; in consequence, the concurrence of his creditors to the trust raised by the general

disposition and settlement executed by him in October 1816, was obtained, with a view to settling his affairs under it. A few days before the Colonel's death, the respondent, his second son, left Glasgow, the place of his father's residence, for Plymouth, to resume his duties as an officer in the navy. On the suggestion of the appellant he granted, before his departure, a factory in favour of Ewing, a writer in Glasgow, and deposited with the appellant a general power to act for him "in the same manner as he could have "done if personally present." Under these powers a claim was prepared by Ewing, for the sum provided to the respondent by the disposition and settlement. This claim, which was signed by the respondent, after he had been informed by the appellant that counsel considered the bond of provision executed by their father as invalid, was lodged with the trustees of the settlement. Upon the claim the respondent received payment of a dividend of L.146.

Afterwards the appellant made various advances of money to the respondent, and on the occasion of his marriage, in 1832, settled a jointure of L.200 per annum on his wife, in case she should survive him, and also commenced paying him an annual allowance of L.250. These payments, taken together, amounted, as at the date of the action out of which the appeal arose, according to the admission of the respondent, to the sum of L.2322, 13s.

In 1837 the appellant restricted his annual allowance to the respondent to L.150, and intimated the necessity for a continuance of the reduction.

In January, 1838, the respondent brought an action against the appellant, setting forth, among other things, the bond of provision executed by their father, and concluding, that the appellant should be ordained to exhibit a rental of the entailed lands, and, on the free rental being ascertained, should be ordained to make payment to him of three-fourths of three years' free rent, with interest on the amount.

The respondent supported this action on the following pleas in law: —

"I. As the late Colonel Porterfield possessed the estate of "Duchal, in apparency for more than three years, and executed "a bond of provision in the pursuer's favour, the defender, as "the heir passing by, is liable for the payment of it under the "act 1695, c. 24.

"II. In terms of the provisions of the bond granted by the "late Colonel Porterfield, the pursuer is entitled to three-fourths "of the sum which may be ascertained to be equal to three years' "free rent of the entailed lands, according to the rent for the "crop and year 1817, under deduction of the interest of any "debts affecting them at the time."

On the other hand, the appellant pleaded in defence, —

"I. The provisions contained in the deed of settlement and "provision libelled on, do not form an effectual burden on the "entailed estate.

"II. The defender is not liable for these provisions under the "act 1695, c. 24.

"III. The pursuer, by ratification of the trust-deed and "acquiescence in the proceedings under it, has abandoned and "lost all claim on the deed of provision.

"IV. In any view the defender, in accounting with the pur-"suer, is entitled to take credit for whatever sums he has paid "him since his father's death, with interest. He is also entitled "to be relieved of the obligation for the jointure of the pursuer's "wife.

"V. The pursuer's claim is at all events subject to deduction "of all liferents, real debts, and the annualrent of personal debts "which may at present affect the entailed lands, and which were "effectual burdens on it at the date of Colonel Porterfield's "succession to them."

On the 9th March, 1839, the Lord Ordinary (*Lord Cockburn*)

pronounced the following interlocutor, adding the subjoined note: — "The Lord Ordinary having heard parties' procurators, "and considered the process, in respect it is admitted that the "bond libelled on was granted in conformity with the provisions "of the entail of Duchal, Finds, that it constitutes a legal obli- "gation, by virtue of the act 1695, chap. 24, against the defen- "der, who completed his titles to the entailed estate, by passing "by his father, Colonel Porterfield, the granter of the bond; "Finds, that the pursuer is not barred by the facts and circum- "stances founded on by the defender, from asserting his right to "payment under the said bond, and to this extent repels the "defences; Finds the pursuer entitled to the expenses hitherto "incurred; appoints the case to be enrolled in order that the "parties may come prepared to state in what mode they propose "that the exact amount of the provision claimed by the pursuer "may be ascertained, and the remaining points of the case de- "termined."

"*Note.*— This is an action for subjecting the defender, under the "Act 1695, c. 24, in payment of a debt due by his father, whom he "passed by in making up his titles.

"The two main points of defence are, that the debt was not oner- "ous in the sense of the statute; and that the interjected person "was not, for three years, in such possession as the act requires.

"1st, The entail of Duchal allowed the heir in possession to burden "the estate on certain conditions, with provisions to younger children. "The late Colonel Porterfield, the father of both the present parties, "availed himself of this power, by executing a bond on behalf of the "pursuer, his second son. There is no objection to the validity of "this bond, either as being struck at by the entail, or as being ex- "cessive, or on any other ground. But as it was not delivered dur- "ing the granter's life, but was only found in his repositories at his "death, it is argued that this circumstance places it beyond the reach "of the act. The argument is, that the statute was meant for the

" protection of creditors; that is, of creditors existing during the " three years, and who are held to rely that the titles of the person " they see in possession, have been made up; but that this principle " cannot apply to the case of an undelivered and revocable deed, " which does not bind the granter during his life; and when there " could be no reliance on his possession, by a person who was not " aware that he had any interest in the possession.

" If the matter were all open, such a case might deserve great con- " sideration. For the freedom of the granter from obligation, and the " consequent ignorance of the grantee of his having even an expec- " tation of a future claim, suggests many views, on which it might be " questioned, whether it formed one of the sort of debts meant to be " included within the act.

" But the doubt comes too late. The statute has been explained " by judgments, the principles of which clearly reach this case.

" Rational provisions, either to wives or to children, are onerous " deeds, so onerous, that they compete with the debts of ordinary " creditors. It was first found, therefore, that an heir passing by " was liable for a provision to a child made in an antenuptial con- " tract, (Muirhead, 17th January, 1724.) This principle was then " extended to the case of a locality, to a wife in a postnuptial deed, " (Glencairn, 23d May, 1800.) It was held in the case of Kennedy, " (11th February, 1829,) to reach a bond of provision to a son. No " doubt, that bond was clothed by infeftment. It may be doubted, " however, if this changed the nature of the right. But at any rate, " there was no such circumstance in the case of Adamson, (16th " November, 1832,) where the provision was in favour of a niece, and " proceeded partly on 'love, favour, and affection,' and partly on a " vague averment of 'long services,' which last pretence, (for it was " really little else,) was held sufficient to establish onerosity, and this, " though the deed was declared to be revocable; the same quality of " revocability distinguished the case of Ogilvie, 16th December, 1817. " There are many other reported examples, in which it is plain that " no obligation lay against the granter, until it was fixed by his death, " and that the grantee had not trusted to the defunct's titles being

" made up, because, not knowing that he was, or was to be a creditor,
" he never thought of the subject.

" How often does it happen, that claims are not known to exist
" until they be disclosed by death. A person lives and dies without
" ever imagining that he owed a shilling. Nor did any human
" creature ever fancy that he was his creditor. But at his death, the
" law, to the surprise of every body, detects him the unknown partner
" of a company, or liable constructively in some other way for a debt.
" It is presumed, that if he had possessed three years in apparency,
" the act 1695 would make his heir apparent liable for these unsus-
" pected claims. As to the granter's remaining unbound himself,
" this will avoid the application of the statute if he was so entirely
" free, that the deed is gratuitous. But where he has a right to bind
" himself, and is under a moral obligation to do so, as in the case of
" providing for children, and leaves a revocable deed unrevoked, his
" death, which prevents the power of revocation, fixes the provision
" on his estate, as thoroughly as if it had been an ordinary debt. If
" the provision now sued on would have been a debt, supposing the
" titles to have been made up, then by this statute it is equally a debt
" after three years' possession.

" 2d, There are two objections taken to the possession.

" First, That as it began on the 22d of May, 1815, leaving that
" half year's rent to the executor of the former proprietor, and ended
" in October, 1818, the Colonel did not draw three years' rent. The
" Lord Ordinary does not think that there is any thing in this. If
" the last half year be taken into account, the Colonel did draw six
" half years' rents. But, besides, drawing the rents is not the only
" criterion or mode of possession. The estate, as has been found,
" was his, and (unless the next objection be sound,) it was in his
" general possession for three years and five months.

" Second, That it was not that sort of possession that the act re-
" quires. This objection is founded upon the fact, that the Colonel
" and Sir Michael Stewart, who were at law about the estate, con-
" curred in granting a factory to a Mr Campbell, empowering him to
" levy the rents, and to divide them during the dispute between the
" two competitors, neither of whom were to claim any expenses of

" process against the other. This, it is said, destroyed the possession " as the possession of the Colonel; and made it either the possession " of the factor, or of Sir Michael, or of neither party, and puts the " property under a sort of sequestration, and destroyed that public " reputation, and display of ownership, on which the statute rests.

" The factory, which was by a letter, has not been recovered, but " its substance is described in the agreement into which the parties " entered, and in the record. It is material to observe, that the " arrangement was confined to the single purpose of letting the factor " levy the rents, and give a half to each party. He is not put gene- " rally into possession, nor does the Colonel give up any iota of right " of possession which he previously had, or was then entitled to have, " as the heir apparent of the former holder, beyond the mere partial " abstinence from receiving and appropriating the whole rents. And " the question is, whether such an arrangement, whereby the person " in whom the title truly is, concurs with a groundless claimant in " each disclaiming costs, provided each share the rents in the mean- " while, and a stranger draws them, under an authority derived from " both, excludes the operation of the statute?

" It appears to the Lord Ordinary that it does not, and that if it " did, it would not be difficult always to evade it. The cases of " judicial factors, or of liferented estates, have no application here. " These are cases where the authority to possess does not flow from " the heir, whose titles are not made up, and the law corresponds with " the plain fact, that the heir is not held to possess, where the pos- " session neither proceeds from him, nor can be controlled by him. " But it has been decided, on the other hand, that the possesion of a " tutor, a factor, or even a disponee, where they represent the heir, " is to be deemed possession by him. Accordingly, it is not disputed " that, if this factory had been granted by the Colonel alone, it could " not have been held to have ousted himself. But the peculiarity is " said to be, that it was granted by Sir Michael as much as by him.

" So it was. But, in the first place, drawing the rents is not the " only mode of possessing an estate. There are many conceivable " ways (such as a proprietor putting the rents, for years after his " death, into the hands of a trustee, for payment of debt) in which a

" property may be possessed, though no rents whatever be drawn or " be due. It is not disputed in the record, or otherwise, that, in every " other respect, the Colonel kept himself clear. In the second place, " how can it be said, that a joint factory to levy rents destroys the " possession of both constituents? The statute does not require the " heir to be for three years in the fullest possible possession. The " case of Donald, 27th February, 1835, was decided on the principle " that there must be 'possession and enjoyment, at least to some real " extent;' and the estate having been possessed entirely by trustees, " for the former owner, the act was found not to apply. But there " surely was possession by the Colonel to a very great extent. He " got half the rents, and *quoad ultra* he got every thing. It is not " averred, that his obtaining his portion of the rents through a factor, " misled any creditor to suppose that the possession was renounced, " either in behalf of the factor, or of his other constituents, and it is " inconceivable how it could have done so. It is a plain perversion " of the fact to say, that he drew part of the rents only by Sir " Michael's permission, since the legal right was in him, it is nearer " the truth to say, that Sir Michael drew his half by permission of " the Colonel. Stating it as unfavourably for the Colonel as possible, " the exact fact is, that, in so far as the rents were concerned, they " were both in possession.

" The defender attempted to make a third point, which, however, " plainly will not do. The Colonel, fearing some possibility that his " bond of provision under the entail might some how or other prove " ineffectual, granted a subsidiary bond, to operate against his general " succession, in the event of the first one failing. And the pursuer, " under an error as to his rights, made a claim on his father's trustees, " under the substitute bond, and drew a dividend of about L.146. It " is attempted to be maintained that this was an abandonment of his " right on the original bond. But it was not. It only evinces an " erroneous doubt of its efficacy. There was no discharge of the pre- " sent claim, and indeed no demand on this bond, or against the de- " fender. The demand was made against the trustees of the deceased, " who had no power to discharge the bond now sued on. The offer

" to give the defender credit for the dividend, restores every thing to " its just position."

This interlocutor was adhered to by the Court (*First Division*) on 18th June, 1839.

The Lord Ordinary then ordered cases to the Court " upon the remaining points of the cause," and on advising these papers, the Court, on the 12th February, 1840, pronounced the following interlocutor: — " The Lords having advised the reclaiming " note, (should have been revised cases,) and heard counsel for " the parties, Find, that in estimating the amount of the provi- " sions for younger children, the interest on the real debts, and " not the principal sums, fall to be deducted; Find, that the " amount of provisions, with which the entailed estate may at " one time be burdened, cannot exceed three years' free rents, " after deduction of the liferents and interests on the real and " personal debts affecting the same; Find, that the bond of pro- " vision executed by the late Colonel Porterfield, constitutes a " valid burden against the entailed estate in so far as its amount, " together with any provisions granted by prior heirs, and in- " terest which had accrued thereon up to the date of Colonel " Porterfield's death, and affecting the estate, did not exceed " three years' free rent at that date; and with the above find- " ings, remit to the Lord Ordinary to dispose of the case, and to " determine all questions of expenses."

The respondent thereafter, under an interlocutor of the Lord Ordinary, stated the sums he claimed payment of from the appellant, and the deductions he was willing to make, which included the annual allowance he had received from the appellant since his marriage, and, at the same time, expressed the willingness of himself and his wife to renounce her jointure. In consequence of a difference between the parties as to the exact amount of the deductions, a reference was made to the respon-

dent's oath, and thereafter, the Lord Ordinary, (on 18th July, 1840,) pronounced the following interlocutor: —"The Lord "Ordinary having heard parties' procurators on the application "of the interlocutor of Court, of the 12th February, 1840, and "on the remaining points in the case, and having considered the "pursuer's deposition in the reference to his oath of verity by "the defender; Finds, that the pursuer is entitled, under the "bond libelled on, to a sum equal to three-fourths of three years' "free rent of the estate of Duchal, as for crop and year 1818, "with legal interest at five per cent on the successive instal- "ments of the said sum, as these fell due respectively until the "date of decree, under deduction, in terms of the said interlocu- "tor of Court, and of the admission by the pursuer in his re- "vised condescendence and state of claim, No. 55 of process, of "the sums therein specified, and interest thereon at five per "cent; Finds, that the sum due the pursuer by the defender, "under the bond libelled, after deducting the sums above "mentioned, amounts, with interest to this date, to L.5226, "7s. 9$\frac{3}{4}$d., as per state produced by him, No. 60 of process: "Finds the defender liable to the pursuer in payment of that "sum, with legal interest thereon, from the date of decree until "payment, and decerns. And in respect the pursuer has agreed, "by the said revised condescendence and state of claim, to dis- "charge the jointure provided by the defender, to the wife of "the pursuer, by the pursuer's marriage contract, in the events "therein mentioned, Finds, that the pursuer is bound, on re- "ceiving payment of the above sum of L.5226, 7s. 9$\frac{3}{4}$d. with "interest, to deliver a discharge of the said jointure to the "defender, and decerns: Finds the pursuer entitled to the "expenses of process incurred by him in the discussion before "the Lord Ordinary, subsequent to the interlocutor of the Inner "House, of date 12th February, 1840; allows an account thereof "to be given in, and remits to the auditor to tax the same and "to report."

This interlocutor was adhered to by the Court, on the 3d December, 1840.

The appeal was against these several interlocutors.

Mr Pemberton, and Mr Anderson, for the appellant.—I. The fraud which the statute 1695, cap. 24, intended to provide against, is not in the heir who makes up his titles by passing by the party who contracted the debt during a possession in apparency, but in the heir who contracts the debt on the credit of land to which he had not a valid title. This is evident, for the heir making up his titles has no option — he must pass by the interjected person — and the fraud, if in the party making up his title, could not be affected by the length of the interjected party's possession, one day would be as good as three years. Whereas, if the fraud be in the interjected party, three years may be supposed to have been adopted as such a length of possession as might reasonably have induced an idea of property and fund of credit.

If this be the true object of the statute, it cannot apply to gratuitous obligations, or to debts contracted with parties cognizant of the true state of the debtor's title. That it does not apply to gratuitous obligations, was decided in the Clydesdale case, *Mor.* 1274, and by implication in the case of Ogilvie *v.* Ogilvie, 16th December, 1817, 19 *F.C.* 422, where the judgment was rested on the onerosity of the obligation. As to the case of Muirhead, *Mor.* 9807, it was founded on an antenuptial contract, or onerous obligation. No doubt Glencairn *v.* Graham, 23d May, 1800, 8 *F.C.* 405, was founded on a postnuptial provision to a widow; but such a provision is onerous, and may compete with ordinary debts, Walker, *Mor.* 953; Robertson, *Mor.* 957; Campbell, *Mor.* 988. But a *mortis causa* provision to a child is not onerous; it creates a mere *spes*, Ersk. III. 7. 40. The case of Kennedy, 7 *S.* and *D.* 397, no way impinges upon

this. There the father had given an heritable bond in security, upon which infeftment had been taken, whereby the provision gave a real right of credit. And the case of Adamson, 11 *S.* and *D.* 40, was expressly rested on the debt of service owing from the granter. In the present case, Colonel Porterfield could never have been compelled to grant the bond, and inasmuch as it was never delivered in his lifetime, or the respondent made aware of its existence, and was subject to revocation, how can it in any sense be said to be onerous, or its non-payment in the lifetime of the granter to have been fraudulent ?

II. The possession contemplated by the statute, is a real and ostensible possession, inducing a belief of ownership, not a constructive and inferential possession. The possession of a life-renter is in law the possession of the fiar, but it is not such a possession as under this statute will make the heir liable for the debts of the fiar, M'Call *v.* M'Call, *Mor.* 9748; Pitcairn *v.* Lundin, *Mor.* 9750. It is not the right to possess, but the fact of possession that rules Knox *v.* Irving, *Mor.* 5276; Donald *v.* Colquhoun, 13 *S.* and *D.* 574. Here Colonel Porterfield was never in actual possession at any period of his life.

[*Lord Campbell.* — Who was in possession then ?]

The agent of both the parties.

[*Lord Brougham.* — Or of the party who should ultimately succeed. The decision was retrospective, and ambulatory.]

The possession was not affected by the ultimate decision. Colonel Porterfield would have got neither more nor less.

But the cases go upon this, that the party must have been in actual possession, of which the case of Buchan *v.* M'Donald, *Mor.* 9822, is a strong illustration, where it was held, that the possession by a judicial factor in a ranking and sale, was not a possession coming under the statute, though the heir apparent had received payment of the reversion of the price of the lands.

Moreover, Colonel Porterfield was not three years even in constructive possession by the drawing of the rents, for the rents payable in October, 1816, were drawn and paid over to the executor of Alexander Porterfield, and the Colonel himself died in October, 1818.

III. The disposition and settlement was intended to operate only in case the bond of provision should prove ineffectual, and was so expressed. The respondent was aware of this, and elected to claim, and did claim under the disposition; he thereby consented to hold the bond as ineffectual, and upon that understanding the appellant made him the heavy payments and allowances which have been made the subject of deduction from his claim. After such acquiescence he cannot be allowed to turn round and recur to the bond.

Mr Solicitor General, and Mr Cook for the respondents, were not called upon.

LORD CHANCELLOR. — I have not heard the whole of this case, but as far as I have heard it, I do not feel any doubt about it. I shall be glad to hear the opinion of my noble and learned friends.

Lord Cottenham. — It appears to me that the appellant has failed in all his points. With regard to the deed, the Glencairn case established a rule applicable in every point to the present. That case was decided on appeal in this House, and on the value of that decision it appears to me there can be no question raised.

The former possessor in the present case, died in May, 1815, and the heir continued in possession till the year 1818, beyond three years; the possession during that time was not in himself personally, but in a person whom he, with Sir Michael Shaw Stewart, who was competing with him, had appointed for the purpose of receiving the rents, (a Mr Campbell;) and all the

rents which accrued between the death of the former possessor, and his own death in 1818, were received by this Mr Campbell, who was appointed by agreement between himself and the other party. It was the possession therefore of the party whose claim might be established, and the claim of Colonel Porterfield was established by the Court of Session.

With regard to the second point, the pursuer was precluded from making his claim, by the supposition that he had no title. No claim can be considered as abandoned, unless the party knowing what are his rights, voluntarily relinquishes those rights. In this case he received a provision under the second deed, on the supposition that he could not succeed under the first. He has now established his claim under that first deed, he has therefore a right to call for an account of what he should receive under the first deed. The appellant suffers no injury by that, he is called upon to pay only what he otherwise would have had to pay, and cannot be allowed to say that the respondent is precluded from asserting the title he has under the first deed.

With regard to the real debts, that point appears to me free from all doubt. Taking the first clause of the deed, with respect to the jointure, which may properly be referred to for the purpose of seeing in what sense the words "real debts" are to be construed in the subsequent parts of the deed, it is impossible to say that the real debts are to be deducted from each year's income, so as to defeat the claim of the widow. It must be taken to mean that it is a yearly income subject to the interest on the real debts. Taking that as furnishing a rule of construction of the other parts of the deed, it is clear that the interest only on the real debts is to be deducted.

With regard to costs, it is quite clear that the pursuer is entitled to his costs; for, being resisted in the whole of his claim, the defendant not offering to pay him what has in fact been found due, but resisting his claim altogether, the pursuer was obliged

to resort to a court of justice to enforce that claim. It follows, that the party who has thus been compelled to enforce his right, ought to be indemnified against the costs of the suit, which was improperly embarked in on the part of the defender. The only possible question would be, not between the pursuer and the defender, the pursuer being at all events entitled to the costs, but whether they ought to be paid out of the estate, or personally by the defender. It is said this claim required to be constituted, in order to make the whole a charge on the estate, but it was not that which made this suit necessary. A suit, if instituted for that purpose, not being a suit litigated, would have had a totally different character, and have been attended with a very different degree of expense to that of the present. The expense of this suit has been incurred by the defender having improperly resisted this suit, and therefore the interlocutor in that respect appears to me to be correct, making the defender not only between himself and the pursuer, but personally, pay the costs of this litigation, which his own improper resistance of the pursuer's demand has rendered necessary.

As to the interest, that is clear beyond all doubt. There is a contract for lawful interest; and there is no ground suggested why the party should not have the benefit of this contract: the length of time which has elapsed, during which the parties have been under misapprehension as to their rights, furnishes no such ground. The contract giving lawful interest, then, must clearly be taken to be five per cent.

Lord Campbell. — I am of the same opinion on all these points.

In the first place, this appears clearly to be a deed within the meaning of the act of 1695, which, notwithstanding the words of the preamble, certainly is not confined to outstanding creditors; and with reference to that it is quite unnecessary to go farther than the case of Glencairn *v.* Graham, which was solemnly decided by this House; it is precisely in point.

Then as to the second point, I think the statute does not say that the party to be charged shall be in exclusive possession of the whole of the lands; but was he not in possession of the lands and estates when he appointed an agent, and received the rents, and disposed of those rents according to the manner in which the arrangement was made that they should be disposed of, until the competition between him and Sir Michael Shaw Stewart terminated. Under the power to receive the rents in the meantime, it would be a joint possession, and it has been decided that a partial possession is quite enough to bring the case within the act of Parliament.

With regard to the renunciation and abandonment, that appears to me not to stand on any intelligible ground.

That brings me to the question of amount. I apprehend it is unnecessary to say a single word as to the deduction of the whole amount of the real debts from the yearly income, because such a thing could not by possibility enter into the meaning of the entailer; he would thereby have utterly defeated the intention which he plainly expresses, of giving a power of jointuring, and making provision for younger children.

Then, with respect to the interest, that is expressly lawful interest, which Mr Anderson allows must be five per cent; what authority, then, has the Court of Session, or this House, to reduce it to four per cent, any more than to say that the creditors shall take half the amount of the principal?

The only remaining point is that of costs, and my opinion is, that the appellant in this case having resisted his liability *in toto*, must be considered as having caused this litigation, and that he is liable to the costs. I think, therefore, that on every ground the interlocutor should be affirmed.

Lord Chancellor. — I have heard only part of the argument. As far as I can form an opinion from listening attentively to what has fallen from Mr Anderson, and from reading the papers,

I concur fully in the opinion expressed by both the noble and learned Lords.

Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be, and the same are, hereby affirmed. And it is farther Ordered, That the appellant do pay, or cause to be paid, to the said respondent, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is farther Ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be, and the same is, hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

GRAHAME, MONCRIEFF, & WEEMS — DEANS & DUNLOP, Agents.

[18th July, 1842.]

CRISTOPHER KERR, *Appellant.*

MRS JANET DICKSON, and Others, *Respondents.*

Prescription. — Possession for forty years of lands *de facto* bounded by the sea shore, but described in the titles as bounded by a sea wall, will not avail the possessor so as to work off the effect of the limitation in his boundary, and entitle him to claim a right of making land, beyond the wall, about to be gained from the sea by artificial operations, his own property.

Property. — The proprietor under a bounding charter of land immediately adjoining the sea-shore, has no right in the shore beyond his boundary.

ON 15th September, 1770, James Guthrie, by feu-contract, disponed to James Nicoll, ".All and haill that small piece or pen- " dicle of arable land, including a small angle of Quarryholes on " the south-east part thereof, being part of the estate of Craigie " on the south-west part thereof, to the southward of the ferry " road; and which subjects, hereby disponed, are bounded — " by the road leading from Dundee to the ferry, and in a " straight line with the northmost of the march stones after " mentioned, upon the north; four march stones, running from " the said ferry road to the River Tay, and the land and Quarry- " holes feued out by the said James Guthrie, of this date, to " Thomas Smart, mason in Dundee, upon the east; the River " Tay on the south; and a march stone and ditch in a direct " line with the east dyke, or part of the glebe belonging to the " parson of Dundee, on the west parts." — " Reserving to the " Magistrates and Town Council of Dundee the privilege and " use of the beach or shores of the subjects before-mentioned,

" adjoining or opposite to the town's salmon-fishing in the River " Tay, for the purpose of drying their nets, and exercising the " right of the said fishings, conform to use and wont." Nicoll was duly infeft upon this contract.

By feu-disposition, dated 3d September, 1785, James Nicoll sub-feued to John Guthrie a portion of the ground feued to him by James Guthrie, which in the feu-disposition was described as, " All and whole that piece of ground, being part of that pendicle " of arable land, and others, of the lands of Craigie, feued by " me from James Guthrie, Esq. of Craigie; and which piece of " ground hereby feued out, lies upon the south side of the road " leading from Dundee to the North Ferry, and immediately " opposite to the subjects feued by the said John Guthrie from " the said James Guthrie of Craigie, and consists of about three " roods and six falls or thereby; and is bounded — by the said " road leading from the town of Dundee to the North Ferry, " on the north; by a straight line and march stones, running " south from the said Ferry Road, at the distance of three feet " from the east gavel wall of John Yeaman's tenement, on the " west; by a straight line and march stones running south from " the said Ferry Road, which divides the subjects hereby feued " out from the subjects still belonging to me, on the east; and " by the sea-wall which divides the subjects hereby feued out " from the sea-beach, on the south parts; and which sea-wall, so " far as the same extends opposite to the said John Guthrie's " subjects, is to be his absolute property; with the privilege and " use to the said John Guthrie and his foresaids, and their " tenants, of the well at the Horse Craig, and free ish and entry " thereto, — they always being at the joint expense of upholding " the same, according to their interest in the said subjects feued " by me from the said James Guthrie, Esq. — with free ish and " entry to the subjects before disponed, and all right, title, inte- " rest, claim of right, property, and possession, which I, my

" predecessors or authors, had, have, or any ways may have, " claim, or pretend to the same, or any part thereof, in time " coming, lying within the parish of Dundee and shire of Forfar."

The precept in this disposition directed infeftment to be given in the land, with "free ish and entry thereto, and whole other " privileges and pertinents of the said subjects, with and under " the foresaid declarations, reserving always to me, my heirs and " successors, full power and liberty of quarrying in the beach or " shore still belonging to me, betwixt the subjects hereby dis- " poned and the River Tay, within six feet of the foresaid sea- " wall, being the south boundary of the foresaid subjects; and " reserving to the said James Guthrie, Esq." power and liberty to work the coals and other minerals. John Guthrie was infeft upon this disposition.

In 1790, Nicoll and Speid, as mid-superiors, granted a precept of *clare constat* to the son of John Guthrie, which described the lands in the same terms as the feu-disposition of 1785, but without inserting the reservation as to the sea-shore, and directed infeftment to be given in " all and whole the foresaid piece of " ground, consisting of about three roods and six falls, or " thereby, lying bounded and described as aforesaid, with the " privilege and use of the foresaid well, and free ish and entry " thereto, and whole other privileges and pertinents of the said " subjects, with and under the foresaid declarations, to the said " John Guthrie, as heir foresaid to his said father." Infeftment was taken upon this precept, and duly recorded.

In 1835, the property of the land came to be vested in the appellant by purchase, the respondents being his mid-superiors, as in right of James Nicoll, the granter of the disposition of 1785.

Owing to certain operations upon the sea-shore opposite this land, which were intended to be carried into effect by Parliamentary trustees for the improvement of the harbour of Dundee,

it was contemplated that upwards of several hundred feet of land would be gained from the sea.

In these circumstances the appellant, in 1837, brought an action against the respondents, alleging that he "and his prede- "cessors in the said subjects have at all times, and especially "since the date of the foresaid precept of *clare constat* and sasine "thereon in the year 1790, been in the unlimited, unqualified, "and undisturbed possession and enjoyment of the foresaid right "of free access to and from the said river, and of the foresaid "right of embanking and gaining ground from the river, under "and in virtue of the said titles; and in particular, in the year "1793, or year 1794, David Neave, then proprietor of the said "subjects, exercised the said right of embanking and gaining "ground from the river, by removing the sea dyke which then "formed the south boundary of the said subjects, and construct- "ing another about thirty or forty feet farther into the river, "and by filling up and embanking the intermediate space, "whereby he gained a large extent of additional ground *ex* "*adverso* of the said subjects; and the said David Neave and the "other subsequent proprietors, and the pursuer, have had the "unqualified and undisturbed possession of the said subjects, "together with the said additional embanked ground, as their "absolute and undoubted property, ever since." That the respondents "now, for the first time, deny the right of the pur- "suer to free access to and from the river, and his right to em- "bank and gain ground from the said river *ex adverso* of the "said subjects, which rights have been enjoyed and exercised by "him and his predecessors beyond the years of prescription, with- "out any dispute or molestation whatever; and they now pre- "tend that they have themselves the right to embank and gain "ground *ex adverso* of the said subjects, and to hold the ground "so to be embanked and gained by them from the river as their "own absolute and undoubted property, which would thereby

'cut off all access by the pursuer to and from the said river, 'and otherwise materially prejudice him in his just and lawful 'rights; and they threaten, most wrongfully and unjustly, to 'prevent the pursuer from exercising his said rights."

Upon this statement the summons concluded, that it should be declared, "that the said Mrs Janet Jobson or Dickson, and "James Ogilvie," (the respondents) "have no right to embank "or gain ground from the said River Tay, *ex adverso* of the "foresaid subjects belonging to the pursuer, and to hold and "possess the same as their own absolute and undoubted property, "or in any way to appropriate the sea beach or shore, *ex adverso* "of the foresaid subjects, so as at all to come or interpose themselves between the pursuer and the river: And it ought and "should be farther found and declared by decree foresaid, that "the pursuer has the undoubted right, at all times, to free access "to and from the said River Tay, *ex adverso* of the foresaid "subjects, and also, that he has the only and exclusive right to "embank and gain ground from the said River Tay, *ex adverso* "of the said subjects, in so far as the said embankments shall "not interfere with, or impede the public navigation of the said "River Tay, and to hold the said ground so gained from the "river as his own absolute property, to the exclusion of all right "thereto on the part of the said Mrs Janet Jobson, or Dickson, "and James Ogilvie: And the said Mrs Janet Jobson, or "Dickson, and the said Dr David Dickson, her husband for his "interest, *jure mariti*, or otherwise, ought and should be "decerned and ordained, by decree foresaid, to desist and cease "from troubling and molesting the pursuer in the enjoyment "and exercise of his said rights."

The pleas in law upon which the appellant rested his action were: —

"1. The defenders have no right of property or other right in "the sea-beach, *ex adverso* of the pursuer's subjects, nor are they

" entitled to interpose themselves between the pursuer and the " existing line of the river.

" 2. The pursuer is entitled to free access to and from the " river, and to embank and gain ground from the river, in so " far as he does not interfere with the public right of navigation.

" 3. Generally, the pursuer is entitled to decreet, in terms of " the libel."

The respondents in their defences denied the averment as to the change of boundary seaward alleged to have been made in 1793, and pleaded: —

" 1. The property originally feued to Nicoll being described " as bounded by the Tay, it included a right to the shore, *ex* " *adverso* of it, and his right has been acquired by, and is now " vested in, the defenders.

" 2. As the property belonging to the pursuer was described " by precise measurement and boundaries, the investitures do " not convey, and do not import to be a conveyance of the sea- " shore, which lies beyond the boundaries, and is excluded by " the measurement.

" 3. These investitures are strictly bounding charters, and the " pursuer cannot prescribe a right to the shore in the face of his " own titles: and even assuming that he had a prescriptive title, " there has been no prescriptive possession.

" 4. According to the conception of the original feu-disposi- " tion, the shore was intended and declared to belong to the " superior, and there is nothing in the subsequent investitures, " which can in law be held to affect or vary the right now vested " in the defenders."

The Lord Ordinary (Moncrieff,) on the 10th March, 1840, pronounced the following interlocutor, adding the subjoined note: — " The Lord Ordinary having considered the revised " cases for the parties, and resumed consideration of the closed " record and debate, and considered the various writs pro-

" duced; Finds, that the pursuer has not set forth any relevant " grounds for supporting the conclusions of his summons of " declarator: Therefore sustains the defences, assoilzies the " defenders, and decerns; Without prejudice always to any " competent objections which may in due and competent form " be raised by the pursuer to any particular operation to be " performed, or structure to be erected, by the defenders, on " the ground or space in question, as their property reserved by " their authors; and reserving the answers of the said defenders " to any such objection as accords: Finds expenses due, and " remits the account when lodged to the auditor to be taxed."

" *Note.* — The issue raised by the summons is, properly, Whether " the space of ground in question is the property of the pursuer, or " whether it remained with Nicoll, the original superior of the pur- " suer's author, and has been transmitted to the defender, Mrs Dick- " son, as in his right. The Lord Ordinary is of opinion, that in every " view of the case it is not the property of the pursuer; he thinks " that it is the property of the defenders; but that, at any rate, the " pursuer has shewn no relevant grounds, for requiring the Court at " his instance to declare the contrary.

" On the plain construction and meaning of the original feu-dispo- " sition by Nicoll to Guthrie, in 1785, no doubt whatever can, in his " apprehension, be entertained. It is as clear as words could make it. " The ground feued, being part only of that belonging to Nicoll in " virtue of his title from Guthrie of Craigie, is not only defined and " limited by measurement to three roods and six falls or thereby; but " a precise boundary on the south is fixed by the 'sea-wall,' admitted " to be then in existence, — and to exclude the possibility of that " being held to give, either directly or by any implication or legal " inference, any right whatever to the beach beyond it, the wall itself " is described as 'the sea-wall which divides the said subjects from " 'the sea-beach.' These words are not at all ambiguous. But there " is still another clause, which takes away the possibility of any argu- " ment on the subject. The granter Nicoll, having bound himself

" not to quarry within six feet of the eastern boundary of this feu, it " was thought prudent to make it quite clear, that he was to be under " no such restriction with reference to the south boundary; and, " plainly with this view a clause is inserted, reserving 'full power and " 'liberty of quarrying in the beach or shore still belonging to me, " 'betwixt the subjects hereby disponed and the River Tay, within " 'six feet of the foresaid sea-wall, being the south boundary of the " 'foresaid subjects.' It is surely impossible by any argument to " make the meaning of this doubtful. That it could not proceed on " the supposition of any right in the sea-beach being given to Guthrie " is apparent, — 1. Because it, in express words, declares the reverse " — that the sea-beach still belongs to me, Nicoll; and 2. Because it " again, in express words, declares that the sea-wall which divides the " subjects feued from the sea-beach, is the 'south boundary' of those " subjects.

" It does not therefore admit of the shadow of doubt, that in the mean- " ing and intention of the parties in the contract, the sea-beach was to " remain the property of Nicoll, and Guthrie was to acquire no right " whatever beyond the sea-wall as his south boundary. When the " pursuer now claims to himself, as in the right of Guthrie, the pro- " perty of the sea-beach, admitted to be south of the sea-wall, — the " very space betwixt the subject and the River Tay, — he is unde- " niably claiming what was neither given and paid for, nor intended " to be given, but, on the contrary, was expressly excluded and re- " served to Nicoll by the contract.

" The other feu-disposition granted to Yeaman a few years after- " wards, though the south boundary is there differently constructed, is " equally precise as to the reality of the intention, that the beach or " shore should still remain the property of Nicoll. But the terms of " Guthrie's title are quite sufficient for this cause.

" The nature of the title being thus perfectly clear on the original " contract, the Lord Ordinary is farther of opinion, that there is no " real difference between it and the precept of *clare constat* in 1790, " on which so much is founded by the pursuer. John Guthrie stood " infeft on the disposition of Nicoll, precisely according to all its " terms. His son, John Guthrie, made up his title by precept of

" *clare constat.* The Lord Ordinary certainly thinks that it would " have been inept and incompetent to include in such a form of title, " which is a mere renewal of the investiture to the heir precisely as " it stood in the ancestor, any subjects not in the ancestor's infeft- " ment; and he may have doubts of the sufficiency of the authority " stated for the position, that additional burdens may be created by " such a title accepted of, — the case of the Magistrates of Edinburgh " referred to in Tait's meagre report of it, appearing to him to be of " very slender authority. But what occasion is there to consider any " such matter? There is no question here about any additional bur- " dens imposed on Guthrie's heir by the investiture of 1790. Neither " is there a single inch added to the subject of the feu: the very " opposite case which the pursuer wishes to reach, but which, if it " existed, would be so essentially different in principle, as to require " very different authority to sanction it. There is no change what- " ever on the boundaries of the subjects, which are *verbatim* the same " in the precept and in the ancestor's sasine. The boundary still is " 'by the sea-wall which divides the said subjects from the sea-beach " 'on the south parts:' — when such is still the express boundary, " how can it be possibly held, that the heir got by such a precept of " *clare constat*, any thing beyond that boundary, which his ancestor by " the same words certainly had not. It seems to the Lord Ordinary " to be a very vain attempt to persuade the Court that there was " either any intention or any act or contract to produce such a diffe- " rence. The only change made on the title was, that from some " unexplained cause, (probably by mere mistake, or to shorten the " deed,) the clause of reservation as to quarrying within six feet " of that south boundary, apparently unnecessary in itself for any " purpose, was omitted, and with it, the words which, incidentally " only, explained in so precise words, that the sea-beach still belonged " to Nicoll. But how could such an omission have the effect of " extending the subject of the feu beyond the boundary, while that " boundary, quite precise in itself, is still continued in *ipsissimis verbis* " of the original title? The Lord Ordinary thinks that it makes no " difference at all. In fact, that clause in Nicoll's disposition had no " connection with the boundaries; it is not in the dispositive clause,

" and is only inserted in the precept of sasine apparently *ob majorem* " *cautelam*; and it is of no other importance in this question, than as " it incidentally declares the sea-beach, between the sea-wall and the " River Tay, still to belong to Nicoll the disponer. To infer an " alteration of the boundary expressly repeated by such a title, con- " taining, as it does, the express clause, 'saving and reserving always " 'our own right, and that of all others, as accords of the law,' would, " in the Lord Ordinary's judgment, be contrary to every principle of " law.

" The meaning and legal import of the titles being thus clear, the " Lord Ordinary is of opinion, that the case, independent of the plea " of prescription, is not at all doubtful, and that the argument in the " pursuer's revised case is altogether fallacious. It appears to him, " in the first place, that the sea-beach is not *inter regalia* in the sense " necessary to the pursuer's argument. It is, no doubt, *publici juris* " in regard to navigation, and some other uses of it. But the Lord " Ordinary adopts the opinion of President Campbell, in the case of " Innes *v.* Downie, 27th May, 1807, as reported by Baron Hume, " which, besides being of high authority in itself, appears to be in " perfect agreement with all the other authorities, — that the sea- " beach or rocks within flood-mark are not *inter jura regalia*, but " subjects of private property for all purposes not inconsistent with the " public uses. He is farther of opinion, however, that it is really " unnecessary to discuss any such question, and incompetent for the " pursuer to raise it. The pursuer grants, and must grant, that there " was a full right in Nicoll to this ground in dispute, as in connection " with the adjoining property. Nicoll gives a certain part of the " subject in feu to Guthrie, with an express boundary, the nature of " which is precisely ascertained. Guthrie takes the right as it is, " and with all its qualifications. Except by Nicoll's conveyance to " Guthrie, the pursuer has no title. How, then, can he dispute " Nicoll's right, as the previous proprietor of the whole subject, — if " this part of it, or this right attached to it, is not given to Guthrie, " or expressly reserved to Nicoll? The pursuer says, and must say, " that it is validly given by Nicoll to Guthrie; for he cannot have " got it by any other title. But how can this be, if it is expressly

" reserved or positively excluded by the terms of the special boun-
" dary? Nicoll, as the original proprietor, and still superior of the
" whole subject, remained proprietor of it with all its adjuncts, except
" in so far as he was divested of it by the deed in favour of Guthrie.
" How, then, can the pursuer, as deriving right from Nicoll, dispute
" Nicoll's right in whatever remained of the original title not con-
" veyed to Guthrie, but distinctly retained by Nicoll? It seems to
" be the most extraordinary fallacy for the pursuer to think, that in
" such a declarator, he can have any title to found on any supposed
" right in the Crown against the assignee of his own author, Nicoll.
" The idea seems to be, that it was impossible, by any form of title,
" to separate the right in the beach from the subject of the feu; and
" that it must necessarily be held to have been conveyed to the feuar,
" though not paid for by him, and contrary to the express terms of
" his own tenure. But what title can the pursuer, as vassal, have, to
" maintain such a plea against his own superior, in violation of the
" express stipulations of the contract? In this point the case would
" be the same, if the feu-contract had only been made two years ago,
" and had expressly borne that the granter should have the full benefit
" of the sea-beach south of the wall, in regard to all the statutory
" regulations of the Harbour Commissioners. Could the pursuer have
" claimed that benefit, or insisted in a declarator, to have it found that
" the superior had not the right to it, contrary to his own contract?
" Such a plea could never be stated, and yet the whole of the pur-
" suer's argument, in the first part of his case, seems to the Lord
" Ordinary to be exactly to this effect.

" There is, however, a plea of prescription, founded on the precept
" of *clare constat* in 1790, with the infeftment on it, and subsequent
" infeftments, and an allegation of possession.

" There is no doubt that, by the statute 1617, prescription may be
" established by infeftments standing together for forty years, though
" proceeding on the entry by an heir by *clare constat*. But there must
" first be a title which admits of prescription in the particular thing
" claimed; and then there must be clear possession of that thing. No
" man can prescribe any right in the face of the very title on which
" he founds. Hence, the rule of law is quite clear, that no man can

" prescribe on a bounding charter, so as to acquire a right to property " which is beyond the boundary to which his right is limited, by the " express terms of his charter itself. Without going into authorities, " the Lord Ordinary holds this to be an absolutely clear proposition. " It cannot be otherwise in the nature of the thing. As the positive " prescription requires a title to found it, there must be a title, suffi- " cient by its terms, to cover the right claimed, although, before pre- " scription has run, the claim might be excluded by anterior or " collateral titles. But if the title itself bears that the grantee's right " shall be bounded by a definite line, known and admitted, there can " be no prescription of ground beyond that line; because there is no " title to which the possession can be applied.

" Now, in the present case, the Lord Ordinary could understand, " that, if the boundary given in the precept of *clare constat* were " different from that in the original feu-disposition, prescriptive " possession might enable the pursuer to say, that that precept must " rule as the title, and that it could not be explained by the clauses " in the original grant. But there is no such case in fact. The " boundary is still the same as it was at first. The precept, as well " as the feu-disposition, is a bounding charter, if there ever was one, " in its words, in its meaning, and in its legal effect. And this being " the nature of the title, the Lord Ordinary is of opinion, that no " prescription to the effect now maintained could possibly run upon it.

" But in the next place, if it were possible for the pursuer to get " over this difficulty, it appears to the Lord Ordinary that there is " no sufficient averment of possession. There is nothing specific " except only the statement, that in the year 1793 or 1794, the sea- " wall having been in disrepair, the feuar then in possession, in " repairing or rebuilding it, changed its position by encroaching a few " feet on the beach. Every thing else that is said resolves into " nothing more than such use of the beach, by passing over it, as the " public may at any time make of it, when it is open and unoccupied. " Such possession could never establish any right, if the ground other- " wise remained the property of Nicoll and his assignees. The aver- " ment as to the change of the position of the wall is denied; and if " it were relevant, it would require proof. But the Lord Ordinary

" thinks it evidently not relevant. It would not be relevant, even " if this action were different from what it is; because, by the pur- " suer's own statement, it was a possession taken in violation of the " express boundary of his own title. But even this consideration " is not necessary to the point of irrelevancy. For the averment " is irrelevant, besides, because the defenders are not disturbing the " pursuer in the possession of the wall as it stands; and the rule of " law is clear, *tantum prescriptum, quantum possessum.* The pur- " suer might keep his wall where it is; but that could not constitute " a prescriptive possession of any thing else beyond it.

" On the whole, the Lord Ordinary thinks that the case is in favour " of the defenders, in respect of the property of the ground; and " that they will be entitled, under the Harbour Statutes, to make the " beneficial use of it contemplated. But as questions of a different " kind might arise in the actual application of it to such uses, he has " inserted a reservation to leave every such question open."

The appellant presented a reclaiming note against this interlocutor, on advising which the Court (Second Division,) pronounced the following interlocutor: — " The Lords having " considered this reclaiming note, with the whole process, and " heard counsel thereon, adhere to the interlocutor complained " of; refuse the desire of the note; of new find expenses due, " allow the account to be given in, and remit to the auditor to " tax and report."

The appeal was against these interlocutors.

Mr Tinney and Mr Anderson for the appellant. — The property of land between the high and low water mark is in the crown.

[*Lord Campbell.* — Your summons concludes that you may hold it as your own absolute property. To succeed, you must shew this.]

Although the property is in the crown, it is only for the public purposes of trade and navigation. The proprietor of the land whose boundary is the high water mark, has a right of free access to his lands from the sea-shore, and to enjoy the shore like any other subject in all the ways mentioned by *Skene, Verb. Sign. voce Wave.* If the sea recede, however, from natural or artificial causes, so as to produce what is called sea green, *i. e.* land washed by the sea only at high spring tides, the land so acquired from the sea does not belong in property to the crown, but becomes the property of the owner of the land whose boundary is the sea-shore. *Ersk.* II. 6. 17; Bruce, *Mor.* 9342; Campbell *v.* Brown, 17 *F. C.* 444. Nay, such owner may embank, and gain land from the sea so long as he does not interfere with the public uses of the sea-shore. Culross *v.* Geddes, *Hume*, p. 554; Leven *v.* Burntisland, *Hume* 555; Boucher *v.* Crawford, 18 *F. C.* 64. This right of occupancy, if it may be so called, arises not from any substantive right of property, *ab ante*, in the *solum* of the shore, but is a privilege incident to his proprietorship of lands bounded by the sea; and it has been recognized in a proprietor whose lands, *de facto*, adjoined, or were bounded by the sea, although his titles did not, *per expressum*, bear that the sea was the boundary. M'Alister *v.* Campbell, 15 *D. B.* and *M.* 490.

The case of Smart *v.* Mags. of Dundee, 8 *Bro. Par. Ca.* 119, did not alter the law in this respect, for the special ground of decision there was, that the burgh had a grant of the shore, and that every thing which was not expressly granted away from the burgh to its feuars was reserved to the burgh; and the parties expressly admitted the correctness of the general doctrine for which the appellants are contending. So in Todd *v.* Dunlop, 2 *Rob.* 333, the *alveus* and *littus* of the Clyde were specially vested by statute in the defenders for certain purposes, and upon this the case was decided.

[*Lord Cottenham.* — The general proposition is one that cannot be disputed, but how do you bring your case within it?]

When the authors of the respondents granted the feu-right of 1785, they parted with the land which, by their own titles, was described as bounded by the Tay, *i. e.* the sea; they reserved no land between the sea-shore and the land feued; nothing, therefore, remained in them in respect of which they could thereafter enjoy or assert the right of occupancy suggested. No doubt the reservation in the deed of 1785 asserts a right of property in the shore, but *ex concessis* the right was in the crown; the reservation, therefore, was simply a nullity.

[*Lord Brougham.* — It could not give a title as against the crown, but could it not give one as against the party to whom the feu was granted?]

We apprehend not, nothing remained in the granter to reserve a title to. The reservation is an interference in truth not between Nicoll and his grantee, but between the grantee and the crown; it was simply nugatory.

[*Lord Campbell.* — Is it impossible that Nicoll may have had a grant of the sea-shore?]

It is for the purposes of this suit, as he has not set up any such grant. After the feu of 1785, Nicoll, like any other subject, might resort to the shore for the purposes of pleasure, but any connection with it in respect of land adjoining, so as to give him or his successors a right to embank, or claim any ground gained by natural or other causes, had altogether ceased.

[*Lord Brougham.* — Could you bring a declarator that Nicoll, and those claiming under him, could not quarry between you and the sea?]

Perhaps not; but we could that he should not build or enclose, because the estoppel must be strictly interpreted.

[*Lord Cottenham.* — Are you not estopped from saying that it is not Nicoll's land?]

There is nothing in the reservation that says so; but however that may be, we do not claim under the charter of 1785; our claim is under the precept of *clare constat* of 1795, in which the reservation is not repeated, and which is with privileges and pertinents.

[*Lord Brougham.* — The boundary is the same as in the disposition of 1785.]

But the reservation is not contained in the precept, and we have had prescriptive possession under the precept. The effect of the reservation, therefore, whatever it may be, is done away with.

[*Lord Brougham.* — That depends on the possession; shew us the possession of the *locus in quo.*]

There could not be such possession, as the *locus* had no existence. We do not claim right of possession of the *locus in quo*, but such rights as we may acquire in respect of our possession of the land in the grant.

[*Lord Brougham.* — Does not the description in the precept exclude you from any right to the shore? it takes a distinction between the wall and the shore.]

Not a distinction which can affect this question; there was nothing beyond the wall that was previously the property of Nicoll, so as to be reserved to him by the terms of the description, and there is no ambiguity in the terms of the description which makes necessary, or can justify, a reference to the previous titles to ascertain what is included within the description, and thus to revive the reservation against the appellants, who have possessed upwards of forty years under a title in which it is not contained.

[*Lord Cottenham.* — Assuming that your grant excludes the shore, it is very difficult to see how your possession, under the precept, of the land contained in it, can give you any prescriptive title to the land excluded from it.

Lord Brougham. — How can time differ the question from

what it would have been if the charter had been dated yesterday, you not having exercised any right over the ground gained?

Lord Campbell. — You have had no visible possession of any thing beyond what is contained in your grant.]

If the reservation was immaterial, then the two grants are the same; and if it is material, then our claim is under the precept in which it is not contained; and possession for forty years, not to be sure of the *locus in quo*, but of the land, in respect of the possession of which a right of the particular nature claimed can be acquired, is sufficient to give that right. We were therefore entitled to a decree in terms of the second alternative conclusion of our summons, or, at all events, we were entitled to declarator in terms of the first alternative conclusion; for whatever may be the right of the appellants, the respondents cannot have any right of property in the land acquired; but the interlocutor of the Court below, by sustaining the defences in which such a right is expressly set up, has in effect recognized such a right to be in the respondents.

[*Lord Brougham.* — Sustaining the defences does not affirm the pleas of the defender.]

In ordinary cases it is immaterial, but here, where a right is asserted in the defences, it appears to be most material.

[*Lord Campbell.* — Without there be an express finding of the Court, it is immaterial what the pleas of the defender are. The Lord Ordinary finds that you have not set forth relevant grounds for supporting your action, and *therefore* he sustains the defences.

Lord Cottenham. — Is not this the ordinary form of interlocutors?

Solicitor-General for respondents. — It is exactly the form which was used in Tod *v.* Dunlop.]

But there the property was claimed by the defenders, and the claim was assented to by the Court, which was not done here;

but perhaps what has fallen from your Lordships may do away any injurious effect of the interlocutor as establishing a right in the defendants.

[*Lord Cottenham.* — The Lord Ordinary in his note expressly says he has reserved the question as to the right of the defenders.

Lord Campbell. — It would have been *ultra vires* for him to have decided more than he has done.]

It is difficult in that view to understand the qualification in the interlocutor.

[*Lord Cottenham.* — The meaning is, he finds that you have not the property, but that you are not to be injured by what the defenders may do.]

That is a species of negative pregnant. It is to say we may complain of what is injurious, but not of an innocent use. The Lord Ordinary should not have sustained the defences, but simply have dismissed the action on our own shewing.

[*Lord Brougham.* — Can any one say that your not having made up your pleas, is to affirm those set up by the defenders? The Court could never mean any thing so unreasonable, and their words don't bear such a meaning.]

LORD BROUGHAM. — My Lords, in this case there can be no doubt whatever. It is unnecessary to dispose of many of the questions which have been raised here, because we are confined to the question on the charter, the bounding charter. Taking it either on both, or even the latter of the two, or the *clare constat* alone, the land within the boundaries laid down there, forms the subject matter conveyed to the present appellant, or those under whom he claims. It is perhaps a little more clear under the charter of 1785, in consequence of the words of reservation; but the boundary is substantially the same in both, and the possession which is alleged to have been had under the second, was perfectly consistent with the first, and might have been with the

exception of one single act of ownership about the year 1793 or 1794, which appears to be in the nature of an encroachment; with that single exception, the possession under the one is the same as the possession under the other. I think your Lordships can have no doubt upon the case.

Lord Cottenham. — I do not think there is the least doubt upon the case. The first feu-contract in the year 1770, described the land as "bounded on the south by the River Tay." In the year 1785, that boundary was changed, and in the grant of that date the boundary was made "the sea wall," with a reservation of interest in the land beyond the sea wall, clearly shewing, that the parties understood, that whatever interest there was in the lands beyond the sea wall, was to remain in the granter, and that the grantee was to take only that which was bounded by the sea wall, including the sea wall itself. The grant in 1790, recites the same boundary as preserved, and there is not the least semblance of an intention in the parties to grant, or an idea that the grantee was to receive more than that which his father, who had previously occupied under the grant of 1785, had taken under that grant, namely, that which was bounded by the sea wall, including however the property in the sea wall itself, leaving all the rest entirely open.

Now, this grantee calls upon the Court to declare a right, which he supposes himself to have not only in that which he did take, but in that which he did not take, and which was expressly excluded from the grant of 1785, and equally excluded from the grant of 1790; he not only asks the Court to declare, contrary to the terms of the grant, that he is entitled to that which he never purchased, and never intended to purchase, and which it was never intended by the other party to grant, but that the other party, whose interest was reserved, may be restricted from the exercise of such rights in that property as he may be entitled to; he prays, that the party who claims the right to that land beyond

the sea wall, may not be permitted to use it in any way to the prejudice of the owner of the enclosed land. It appears to me that he has shewn no ground whatever upon which he can ask for the interposition of the Court. It does not appear to me that the interlocutor does any damage or injury to the pursuer, from the terms in which it is drawn up, inasmuch as it only dismisses him from the suit, and sustains the defences so far as they are necessary for the purpose of shewing, that the pursuer has no right to that which he seeks, cautiously reserving any future ground of complaint which may arise. I see no ground whatever for disturbing the judgment of the Court below.

Lord Campbell. — As between the granter and grantee, this is a claim expressly in the very teeth of the terms of the grant. Then, as to a title by prescription, there are only two objections to it; first, that there is no title; and second, that there is no possession. On these grounds, I am of opinion that the judgment of the Court below ought to be affirmed.

Ordered and Adjudged, that the petition and appeal be dismissed this House, and that the interlocutors therein complained of, be affirmed with costs.

RICHARDSON and CONNELL — GRAHAM, MONCRIEFF, and WEEMS, Agents.

[18*th July*, 1842.]

JAMES GIBSON, Esq. of Hillhead, *Appellant.*

ANDREW RUTHERGLEN and Co., *Respondents.*

Bill of Exchange. — A bill for payment of the price of goods, drawn upon a party who had gratuitously undertaken their disposal, but had afterwards left it in the hands of another party, who was to account to him, is not, while the result of the sales is as yet unascertained, an accommodation bill, but one which the accepter must pay; his relief, in case of over-payment, being on the ultimate taking of the account.

Principal and Agent. — A party who had gratuitously undertaken the disposal of goods in a foreign country, whither he was going on business of his own, being unable to conclude the business before leaving the country, left it in the hands of an agent, with instructions to remit the proceeds to himself, *held* that he was liable, while the result of the sales was as yet unascertained, to pay a bill which he had accepted for the price of the goods.

THE appellant brought an action against the respondents before the Magistrates of Glasgow, alleging, that in 1837, when on the eve of setting out on a visit to Canada, he was requested by them to undertake the charge of a venture of books, which they were about sending to that country. That as his trip was to be one of pleasure, he at first refused, but ultimately agreed to comply with this request, on the express understanding that he was not to incur any risk or responsibility whatever; and that he was farther induced to undertake the collection of some accounts which were due to the respondents on the same understanding. That the goods were accordingly shipped by the respondents, and when the vessel was on the point of sailing, they handed him a paper book having the following title, — "A list of goods sent on

" venture, by Andrew Rutherglen and Company, in the 'John " 'Lee,' and consigned to the care of Mr James Gibson. The " left hand page contains a list of the goods with their cost prices " — the right hand page contains the same list with their selling " prices here." And which, after enumerating the goods, had this memorandum,— " Mr Gibson has here exhibited a list of the " whole articles consigned to his care: he has the cost and the " usual selling prices, and all the instructions we have to give " are, that he deal with them as if the articles were entirely his " own." That on arriving in Canada he found the goods to be unsaleable, and as he had never intended remaining in that country, he intrusted their disposal to Sheddon, a merchant in Montreal. That afterwards Sheddon informed him the goods had been sold by him for about L.35 sterling. That, before leaving, he was enabled to obtain a composition on one of the accounts he had been requested to collect, of 5s. in the pound, for which he took two bills for L.11, 2s. 6d. each. That on the 6th March, 1838, the respondents wrote him a letter in these terms: — " Sir — We have this day received your acceptance for " L.80, dated 6th March, at four months, as an advancement on " the consignment to Montreal, and will renew the same if the " said consignment is not arranged when the bill falls due, less " the amount of Stark's composition, if it has been paid by him." That he at first refused to accept the bill mentioned, but afterwards, on the urgent solicitations of the respondents, he did accept it. That at the time when the bill fell due, he had not received any remittance from Canada, and he therefore called upon the respondents to take it up. " That on this occasion the " pursuer saw the defender, Andrew Rutherglen, who repre- " sented that it would be inconvenient to his company to retire " the bill at that time, and solicited the pursuer to renew it. " This the pursuer very reluctantly complied with, upon the " conditions similar to that on which he had accepted the first

" bill, and, in particular, that he was, in the event of no remit-
" tances from America on account as aforesaid, to get no trouble
" with the renewed bill, either by payment or renewal thereof."
That before the renewed bill became due, he received payment of one of the bills for L.11, 2s. 6d., and paid it over to the respondents. That by the time the second bill became due, he had not received any farther remittance from Canada, and he accordingly called upon the respondents to take it up also. That they had not done this, and he had in consequence been obliged to pay the bill to an indorsee on the compulsitor of diligence, with the expense of the diligence, but under protest against the respondents of his non-liability, and after an unsuccessful attempt to suspend the diligence. That during these proceedings, he received payment of the second bill of L.11, 2s. 6d, and thereupon intimated to the respondents his readiness to pay the amount over to them.

Upon these statements, the appellant's summons subsumed, that the respondents were liable in relief and repayment to the pursuer of the foresaid respective sums of money so incurred, advanced, and paid by the pursuer for, and on their account, all as before stated. And concluded, that they should be decreed to make payment to the pursuer of the foresaid sum of L.80 sterling, contained in the said last mentioned bill, with the said sum of 19s. 3d. sterling of interest due thereon up to the said 5th day of February current, so paid as aforesaid, together with the lawful interest on said bill since the said 5th day of February current, aye and until payment. And also of the expenses of suspending the diligence, under deduction of L.11, 2s. 6d.

The respondents, in their defences, denied the statements in the summons generally, and declined to go into them particularly, as the conclusions were limited to asking repayment of the bill; and pleaded, that they had not come under any obligation to take up *that* bill, and they were not bound to do so, whatever might be their liability on the ultimate accounting.

GIBSON v. RUTHERGLEN & Co. — 18th July, 1842.

Under a diligence for recovery of writings, issued at the instance of the appellant, a letter from the respondents to the appellant, dated 14th March, 1838, was produced, which was in these terms: — "On presenting your bill, along with a few others, "for discounting at the Glasgow Bank, I was met with a demur "to your bill, on account, I could perceive, of some old sore. "As I wish no favour on the score of a regular business transac- "tion with bankers, I withdrew the bill, and will esteem it a "favour if you could serve me in one of the two following ways: "— 1st, Say where you do your own business; if I'll get the "needful there; or 2d, You will probably be able to get Mr "Watt or some other friend to add his name on the bill as an "indorser. This will answer me equally well. As a matter of "course, I'll hold by the original agreement, to renew when it "falls due, if our American business is not arranged by that "time. I have enclosed the bill, so that if you add an indorser, "you can do so and return it to me indorsed. I would not at "all have troubled you but for the great difficulty of getting "payment at this time."

There was also produced another letter from the respondents to the appellant, dated 12th December, 1838, which was in these terms: — "Sir, — Your agent, Mr Wilkie, having declined to "receive from our agent an answer to the protest he yesterday "served on us at your instance, we think it proper to lay before "you the following brief narrative of your business connection "with us, a copy of which, in our own justification, we shall "also submit to Mr Inglis, since you have chosen to include "him in the most uncalled for manner in this protest. Every "word of what follows you know to be true: —

"In June 1837, you were introduced to us by Mr Robert "Watt, as being about to visit Canada, in a vessel of your own, "on a business venture; and we were requested, and, on the "faith of Mr Watt's recommendation agreed, to consign to your "care, goods, the net cost of which to us was L.108, 1s. 4d. We

" also gave you a statement in detail of the usual selling prices " of the goods here, and entered into an express agreement with " you that you should receive for your trouble the one-half of " the nett profit derived from the venture. In short, we com- " mitted the goods to your care, as if they were your own. On " reaching Canada, however, instead of superintending the con- " verting of these goods into cash, as we were assured you would " do, you now informed us that you turned them over to a per- " son named Sheddon, of whom we knew nothing, and who " never received any instructions from us anent their sale. You " have also now stated that Mr Sheddon has sold the goods at " prices that, after deducting charges, will only remit L.35. Now " the goods were of such a description that we would not on any " account have made the smallest sacrifice upon them, and had " you informed us that there was any difficulty in netting our " cash prices with the charges, we would at once have ordered " the goods home.

" In addition to this consignment you also took charge of col- " lecting several accounts due us in America, and among these " you accepted for us a composition of 5s. a-pound upon a claim " of L.89, payable in two instalments, at one and six months. " Our instructions were to take 6s. 8d. only, but we made no " complaint on this point, as we wished the account closed. " Towards the close of 1837, you returned from America, and " on the day after your return our Mr R. met you by accident " in Mr Watt's shop. You then stated that you had received " the first instalment of the composition, and that on the follow- " ing day you would call at our shop and pay over the amount, " and give us information anent the consignment. This, how- " ever, you never performed; and although waited upon at your " house, and frequently applied to on the subject elsewhere, and " on all occasions, you promised to wait on us; yet the month of " March last 1838 arrived without our having the smallest " information on the transactions; thus exhibiting such a degree

" of carelessness as surprised us very much. With the view of " bringing the matter to a close, we wrote you at this time inti- " mating our intention of drawing on you for L.80 at four " months, to account, and you then called upon us, and expressed " your willingness to accept the bill, provided we would promise " to renew it when due, if you had not then got your accounts " settled with your agent in Canada, and we agreed to this, but " stipulated that the renewal should be less the amount of the " composition you had received in Canada. This bill fell due in " July, and we were ready to renew it as agreed upon. You then " asked as a personal favour that we would renew it for the full " amount, L.80, as it was not convenient for you at the time to " pay us the amount of the composition, and that you would " willingly pay us the interest for retaining this amount, and " accordingly we did renew the bill again for its former amount; " but we were neither asked nor gave any promise of a farther " renewal.

" You are aware of the efforts since made to obtain a settle- " ment with you, and of these efforts having hitherto proved " vain. You are aware too, that it is only now for the first time " that you tell us that you have not got payment of the second " instalment of the composition, and that the bill for it lies in " Canada unpaid, while it should have been paid last February.

" Now that these circumstances, instead of being advised in " course, are for the first time communicated to us, you can " scarcely be surprised at our repeatedly expressed determination " to hold you responsible for this instalment, and as well as to " insist for an immediate and final winding up of our accounts.

" As to your statement that the bill is held by a pretended " indorsee, we beg to repeat what you know, that Mr Inglis " regularly and faithfully discounted your bill; and farther, that " as we have often stated to you, we are quite ready to settle our " accounts with you whenever you please. — We are, &c."

The appellant referred " the averments on the record, so far

" as not established by the admissions and productions in pro-
" cess," to the oath of the respondents. Under that reference, the respondent Rutherglen emitted a deposition, which, in regard to the renewal of the bills was in these terms: — " The " deponent adds of his own accord, that two or three days before " the first bill became due, the pursuer came to the deponent, " and stated that he was not able then to pay Stark's composi-
" tion; and that he had not got his American affairs wound up, " and that it would be an obligation to him if deponent would " agree to renew said bill; and he farther states, that his reason " for not immediately paying the pursuer the amount of the " renewed bill in one sum on the said 9th of July was, that the " person who was to discount it was from home, and in fact the " subsequent payments, to the amount of L.50, composed of the " L.20 and L.30, were paid before the bill was got discounted." This deposition confirmed the appellant's statement in regard to the two bills of L.11, 2s. 6d. each.

The Magistrates of Glasgow assoilzied the respondents. The appellant carried the case by advocation to the Court of Session, and the Lord Ordinary, on the 17th November, 1840, pronounced the following interlocutor, adding the subjoined note: — " The Lord Ordinary having considered the record in the infe-
" rior court, additional pleas in law, documents produced, and " whole process, advocates the cause, and Finds that the present " is an action of relief brought by the pursuer and advocator, " James Gibson, against the defender, Andrew Rutherglen, " trading under the firm of Andrew Rutherglen and Company, " whereby the pursuer seeks relief of a certain bill, and expenses " incurred thereon, as accepted by the pursuer for the defenders' " accommodation, and latterly retired by the pursuer: Finds it " proved by the documents recovered and produced, and by the " defender's deposition *in causa*, that the bill libelled on was " granted in order to procure a fund for retiring a prior bill

" which had been solicited from the pursuer by the defender, " who received the contents of the same: Finds it proved by the " missive dated 6th March, 1838, under the hand of the " defender, that these bills were not drawn by the defender, or " accepted by the pursuer, in liquidation of any debt due by the " pursuer, but as 'an advancement on a previous consignment " 'by the defender to Montreal:' Finds, that the pursuer has " specially alleged, that no funds of the defender, other than " those admitted in the summons, had come into his hands from " the said consignment, or otherwise, prior to the closing of the " record; and that the defender has neither proved, nor pointedly " averred the contrary, nor established in any form, that the " pursuer is personally liable in the value of the said consign- " ment: Finds, under these circumstances, that the defender " ought to have retired the bill libelled on when it fell due, and " that he is now bound to relieve the pursuer of the same: " Therefore recalls the interlocutor of the Magistrates com- " plained of, and decerns against the defender for relief and " payment to the pursuer in terms of the libel: Finds the advo- " cator entitled to the expenses incurred by him, both in this " Court and in the inferior court, as the same may be taxed by " the auditor, and decerns; reserving to the defender to call " the pursuer to account for the proceeds of the books and " accounts sent with the pursuer to Canada, and to the present " pursuer all competent defences against such action as accords."

" *Note.* — The grounds of the pursuer's claim appear to be stated " very correctly (though perhaps with too much detail) in the libel " in the inferior court; and if that statement be correct in point of " fact, it is humbly conceived that its justice and relevancy in point " of law are alike undeniable. The Lord Ordinary, however, cannot " find that any essential fact, on which the pursuer relies, has been in " any one point shewn to be erroneous. Hence he has found himself " compelled to differ from the learned judge in the inferior court, and

" having set forth in the interlocutor the series of facts on which he " proceeds, a short additional explanation of his views will now " suffice.

" 1. In the first place, it is supposed to be clear that anterior to the " granting of the first bill referred to in the record, the pursuer, " Gibson, was not the debtor of the defender in any definite sum. " Even when goods are sent to an ordinary agent for sale or commis- " sion, the agent is not liable for the price, unless he has acted be- " yond his powers, or has undertaken to sell on a *del credere* com- " mission. Nothing of the kind is alleged here. Indeed, it deserves " especial notice that the pursuer got charge of the defender's goods " and claims under peculiar circumstances. He was not going to " America to remain permanently there; he had no partner abroad; " but apparently he was going on a short visit, carrying a few goods " of his own, and the defender took that opportunity of asking the " pursuer to take certain accounts and boxes of books along with him, " while he specially added a memorandum to the list which accom- " panied them, bearing 'all the instructions we have to give are, that " 'he deal with them as if the articles were entirely his own.' It is " out of the question to hold that a party who had goods proffered to " him upon such terms incurred any personal liability respecting them, " unless gross negligence or dishonesty were alleged.

" 2. It is next to be noticed that the pursuer seems to have re- " mained a very short time in Canada. He sailed in June, 1837, and " had returned by the beginning of 1838; and during the interval, it " is probable that Canada was not in a state for getting mercantile " adventures disposed of to advantage. Be that as it may, it appears " that the pursuer could recover none of the debts, though he agreed " to a composition payable in instalments, on one of the largest debts " assigned, being that due by one Stark. He alleges he could not " sell the books at any price satisfactory to him; so he put them into " the hands of a Mr Sheddon, for sale, at Montreal, who seems to " have employed an auctioneer, who afterwards sold them at a very " great loss. In the meantime, the defender applied to the pursuer " to sign a bill for L.80, setting forth that he was in want of a tem- " porary accommodation; and the pursuer agreed to accept the bill,

" on the defender giving the acknowledgment dated 6th March, 1838, " which is engrossed in the summons. It sets forth that his company " had received the bill 'as an advance on the consignment to Mon- " 'treal, and will renew the same if the said consignment is not " 'arranged when the bill falls due, less the amount of Stark's com- " 'position, if it has been paid by him.'

" 3. The pursuer has averred (explicitly) that, subsequent to the " date of these bills, he got no part of the proceeds of the consign- " ment from America, save and except one of the instalments of " Stark's composition, which he offered instantly to account for; and " he specially avers in the libel that this was 'the whole funds in his " 'hands belonging to the defender.'

" Under these circumstances, it humbly appears to the Lord Ordi- " nary that the plea of the defender is neither founded in the law or " justice of the case. His main proposition in defence is, that he " bound himself only once to renew the bill granted by the pursuer " to him; and that if the pursuer had got no settlement or remittance " from America when the second bill fell due, he must bear the ad- " vance for an indefinite time; in short, the plea is, that the pursuer, " by acceding to the defender's application for the accommodation, " thereby became bound to guarantee that the goods would yield at " least L.80, and that he was to suffer the whole loss if there was any " deficiency. The Lord Ordinary must own that he takes a very " different view of the real nature of the transaction between the " parties in the present instance. In the first place, the letter does " not say that the bill is to be renewed only once; on the contrary, " it implies that the defender was to keep the pursuer free of advance " by renewed bills till the consignment in America was arranged, *i. e.* " finally realized.

" But besides the obligation to renew, the letter expressly states, " that the first bill was granted as 'an advancement on the consign- " 'ment.' Surely, however, it is a trite rule in mercantile law, that " if a consignment yield less than a sum advanced on it by an agent, " or if the goods are lost, not by any fraudulent act imputable to the " agent, the consigner must repay the advance to the agent. Accord- " ingly, let it be supposed that by the time the first bill fell due, it

" had been finally ascertained, from accounts and remittances, that " the goods were only to yield L.40 instead of L.80, and that the " consignment had been wound up in Canada with that great loss, " could the defender have thrown it on the pursuer? Possibly he " might have done so by establishing, in a competent action, fraud " or culpable negligence; but no such case is raised here. If the " pursuer, however, would have been entitled to relief even of the " first bill, in so far as not reimbursed by remittances from America, " wherein is the case altered by the granting of the renewed bill? " Surely the pursuer was not thereby deprived of any right of relief " which could have been competent to him at the maturity of the first " bill, if the final arrangement of the consignment in America had " then brought a deficiency.

" It is said that there has, as yet, been no final arrangement of the " said consignment, as the price of the books has never been remitted. " From whatever cause, however, the want of remittances has arisen, " it is enough to state that no blame, or ground of personal liability " is condescended on against the pursuer; and if so, the party who " got the accommodation from him is legally bound in relief. One " thing is proved by the productions, that the defender, so far back " as June, 1838, got Sheddon's account of the sale of the books, (see " letter of 14th June, 1838,) but it is not alleged that he has as yet " taken any measures abroad (if any would be available) to compel " Sheddon to remit the balance due.

" It was strenuously argued at the bar that the pursuer was strictly " limited by the terms of his libel from seeking relief from the bill " sued for on any other ground than under the obligation contained " in the acknowledgment of 6th March, 1838, which was said to apply " to the first bill only, and not to the second; but this appears to be " altogether a very strained and erroneous construction of the libel. " The letter, besides its obligatory clause, contains an acknowledg- " ment of the relation between pursuer and defender, of consignee " and consigner; and it being thus established *scripto* of the defender, " that he had no constituted claim of debt against the pursuer, " while it was moreover set forth specially in the summons, that the " pursuer had accounted for 'the whole funds in his hands belonging

" 'to the defender.' The libel thus seems to be most correctly " adapted to the proper nature of the claim in which the pursuer had " occasion to insist.

" Before concluding, the Lord Ordinary must remark, that the terms " of the reference to oath in the present case seem to be peculiar. " The pursuer refers to the defender's oath 'the whole averments in " 'the closed record, so far as not already established.' This seems " greatly too loose and vague to be approved of as a precedent. But " truly the defender's oath is of little consequence, unless it be held " sufficient to establish *per se* the pursuer's case, as Rutherglen swears " on the reference that 'he gave no other goods, money or value " for the said bill, except what are stated in the excerpt 'from his " 'ledger, No. 1-4 of No. 14 of process, and that the said excerpt " 'contains a complete statement of the whole transactions between " 'the parties.'

" The account thus referred to is an account between consigner and " consignee, which of course infers no liability on the latter beyond " that of exonerating himself of the consignment. If the defender " had thought that he had any grounds for subjecting the pursuer " personally for the value or proceeds of the consignment, he should " have set forth his allegations to that effect on record, and probably " have raised a counter action to establish his claim. In the record, as " made, there are no *termini habiles* for entering into such proof, but a " reservation is made to the defender to raise a proper action to that " effect, if so advised."

The respondents reclaimed against this interlocutor, and on the 6th March, 1841, the Court altered it by an interlocutor in these terms: — " The Lords having considered the reclaiming " note for the respondents, and heard the counsel for the parties, " alter the interlocutor of the Lord Ordinary reclaimed against, " Repel the reasons of advocation, and remit to the Magistrates " of Glasgow, *simpliciter*, and decern: Find the advocator liable " in expenses, and remit to the auditor to tax the same, and to " report."

The appeal was against the interlocutors of the Magistrates, and of the Inner House.

Solicitor General and Anderson for appellants.

[*Lord Campbell.* — In the summons it is alleged that a guarantee was given against the second bill; this is denied. You must shew that it was the duty of the respondents to take up the second bill.]

The action is not confined to any special undertaking, but is founded on a general statement of the whole *res gestæ*, and the duty of the respondents to take up the bill, in respect of its being given as an accommodation.

[*Lord Campbell.* — It is impossible, if you mean by an accommodation bill one for which no value was given, to hold this to be an accommodation bill. The appellant "accommodated" the parties, no doubt, by accepting the bill before receiving payment of the goods.]

The letters in the summons shew no more than an agreement for an accommodation. The appellant was under no obligation to advance upon the goods.

[*Lord Campbell.* — To whom was Sheddon to account?]

To the respondents.

[*Lord Cottenham.* — What proof is there that they adopted Sheddon as their agent?

Lord Campbell. — There can be no doubt he was to account to the appellant.]

The letter of 14th March, 1838, shews the idea the respondents themselves had of the transaction as being one of favour, not of business; and that neither party contemplated an advance as in an ordinary case of consignment.

[*Lord Campbell.* — That referred to the original bill.]

Yes, but it explains the nature of the transaction, and shews, that originally there was no consideration, and that the advance was asked as a favour, not on the faith of the consignment.

[*Lord Cottenham.* — The second bill is a contract to pay a certain sum at a certain date; what is there to do away that?

Lord Campbell. — How can you say there was a failure of consideration? the consideration was the right to receive money from Sheddon, and that still subsists.]

But Gibson was not under any obligation, legal, equitable, or honourable, to advance; his position was one purely friendly and gratuitous. The undertaking in the letter of 6th March was not confined to any particular bill; it was an obligation to renew generally. The whole transaction entitles us to assume that the second bill was accepted on the same terms as the first. It was a fraud, therefore, to pay it away.

[*Lord Cottenham.* — The question might have been put direct under the reference to oath.]

The respondent's voluntary statement in the conclusion of his deposition confirms our statement.

[*Lord Cottenham.* — If a common consignee accepts a bill to the consignor, can he refuse payment because he has not received the price of the goods?]

Gibson was not a consignee.

[*Lord Cottenham.* — He was the agent who undertook to sell.

Lord Campbell. — He was not a mere carrier; he had a power of sale.

Lord Cottenham. — The letter of 6th March saying the bill was an advance, would not Gibson have been entitled to receive payment from Sheddon?

Lord Campbell. — Unless you can make out that the guarantee was to apply *toties quoties*, you have no case.

Lord Cottenham. — The case is not by the summons put upon that, but upon a new contract. It says the appellant complied with the request of renewal "upon conditions similar to that on which he had accepted the first bill."]

But Gibson, independently of that, was not under any obligation to accept the bill.

[*Lord Campbell.* — Neither is an ordinary consignee, but if he accept he must pay.]

If Sheddon had failed the day after, Gibson, as a gratuitous bailee, getting no advantage by the transaction, could not have been liable for the value of the goods. Even if viewed as a consignee, he would be liable only for what he actually received.

[*Lord Cottenham.* — That is not the case your summons puts. You go upon a contract to renew the bill.

Lord Campbell. — Nothing is said in the summons about the value of the goods, or your right to recover the difference between the value of the goods and the actual sale.]

The summons is larger, it asks for the whole L.80, *minus* the L.11, 2s. 6d, without taking into account Sheddon's receipts.

[*Lord Brougham.* — Would not the respondents be liable to Gibson for commission ?]

We submit not.

[*Lord Brougham.* — It would be very difficult to resist such a claim.]

It is admitted that the appellant is not to sustain the loss, but that the whole matter may be ripped up in an action of accounting; why should he unnecessarily be put to that at present? The House is not sitting as a mere court of law, and is entitled to take into consideration what is a fair inference.

[*Lord Brougham.* — There were two letters on the 6th March, why was not the same care taken on the second occasion ?]

Because the party thought he was safe by what had passed on the first.

Pemberton and Wilmer for the respondents were not called upon.

LORD CAMPBELL. — My Lords, the opinion of the Lord Ordinary is undoubtedly entitled to the highest possible respect. I am sure there is no judge in England or Scotland for whom I

entertain more sincere deference; but I am of opinion, that he has taken an erroneous view of this subject, and that the interlocutor of the magistrates with the assistance of Mr Reddie and of the Inner House, ought to be affirmed. Now for what is the action? The action is against Rutherglen and Co., for not taking up this second acceptance. It proceeds upon the ground, that they were bound to have taken up that acceptance, and that they were guilty of breach of contract in endorsing it to another person, and enabling that other person to enforce payment from Gibson the acceptor. How is that to be made out? First, it is said that this was an accommodation bill. It is quite clear to me that it was not an accommodation bill. It was a bill accepted to oblige Rutherglen and Co., but it was not an accommodation bill in the general sense of the word, it was not such in their contemplation. Mr Gibson was intrusted with certain goods to sell; he carried them to Canada, according to the mandate he had received; he did not sell them there himself, but he left them with Sheddon to sell, Sheddon being considered as the agent, and Sheddon being to pay the proceeds to Gibson in Scotland. Gibson knowing these circumstances, returned to Scotland, expecting the proceeds to be remitted to him; there he accepted a bill for L.80, the selling price, according to Rutherglen and Company, being L.200. Is that an accommodation bill? It certainly is not, for it is in consideration of the proceeds of those goods to be received by Gibson from Sheddon. But it is said, there is a contract whereby Rutherglen and Company were not to take this as a bill on which they might have maintained an action against the acceptor. How is that contract to be proved? There is an express contract with respect to the first bill given by Rutherglen and Company, "We have this day received your "acceptance for L.80, dated 6th of March, at four months, as "an advancement on the consignment to Montreal, and will "renew the same, if the said consignment is not arranged when "the bill falls due, less the amount of Stark's composition, if it

" has been paid by him." That applies to the bill of the 6th of March, and if Gibson had been sued upon that bill, in respect of this guarantee, he would have had a clear remedy for the sum he was obliged to pay upon it. But that does not apply to the subsequent renewal, and the pursuer feeling that, alleges upon his summons that there was at that time, the 6th of March, an express undertaking, that he, the pursuer, the acceptor, should never be called upon to pay, or be brought into trouble about this debt, until he had received the proceeds from America. If he had proved that, he would have made out his case, but there is not a tittle of evidence to support it; and though he refers the Court to the oath of the party, he does not venture to put a single question upon that subject to the party when examined. Therefore it stands entirely without evidence. Then here you have Gibson, the accepting party, entitled to receive the proceeds of the goods from America, who accepts a bill of L.80 at four months. Of course he is liable upon that bill, unless he shews some contract whereby he was to be relieved from the liability he incurred when he put his name as acceptor. He has shewn no such contract; it appears to me, therefore, that he would be liable as the acceptor of that bill, and being liable as the acceptor of that bill, that he has no action at all against Rutherglen and Company, on any special undertaking they had entered into that they would indemnify him for being the acceptor of that bill. He does not prove that Rutherglen and Company undertook either to take it up or to renew it. He stands then in the common situation of a party who has accepted a bill, and who is sued upon it. It appears to me that the interlocutor of the Inner House, reversing the interlocutor of the Lord Ordinary, ought to be affirmed.

Lord Cottenham. — The only question is, whether the defenders are under an obligation to repay what the acceptor of the bill has paid. If he can establish that, there must be some contract proved. A contract is alleged, but we cannot act upon that alleged con-

tract without some proof of it, and of that there is no evidence. The summons does not rely upon any supposed understanding between the parties, that the second bill was to be given upon the same terms as the first, but it states in terms, that a contract was entered into for that purpose, and it was necessary on the part of the pursuer, to prove that which he has alleged. Now it may very well be, consistently with the facts, as far as they appear, and that probably will turn out, that more has been paid by Gibson than Gibson expected he would have been responsible for, in respect of those goods; but the bill is a mere payment on account of that transaction, and if, when the account is taken, it turns out that he has paid more than he has received, of course he will be entitled to be repaid. But that is not the object of this suit; the object of this suit is not to have an account taken of the proceeds of these goods which Gibson had received, and for which he was responsible to the respondents, but to establish a right to have the repayment of this sum of L.80, independently of the account pending between the parties. It is quite sufficient to say, that this suit, resting itself on a contract which alone could entitle the pursuer to the judgment he asks, and of which he has given no proof, the suit necessarily fails for want of evidence.

Lord Campbell. — I ought to state, that Lord Brougham, who has heard the whole of the argument, is entirely of the same opinion.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor, so far as therein complained of, be affirmed with costs.

DEANS & DUNLOP — GRAHAM, MONCRIEFF, & WEEMS, Agents.

(Heard, 21*st February*. — Judgment, 2*d August*, 1842.)

The RIGHT HONOURABLE COSPATRICK ALEXANDER HOME, commonly called LORD DUNGLAS, and ROBERT CUNNINGHAM, *Appellants.*

HER MAJESTY'S OFFICERS OF STATE FOR SCOTLAND, and HER MAJESTY'S ADVOCATE, for, and in name and behalf of the Commissioners of her Majesty's Woods, Forests, Land Revenues, Works, and Buildings, *Respondents.*

Crown. — *Public Office.* — *Pension.* — A grant of an office of Chamberlain of a royal forest, and of "an annuity or yearly salary, as "well in consideration of the said office, as out of the royal bounty," which salary amounted to more than the whole revenue to be collected, the surplus being made up out of another source of royal revenue, was set aside as being the grant of a pension under cover of the grant of an office, and as an alienation of the crown property.

Crown. — Whether the Crown, when respondent, has a right to reply on the reply of the appellant, *Query.*

Process. — Sufficiency of libel to support judgment.

ON the 27th day of July, 1827, a warrant was issued by George the Fourth, directing a letter to be passed under the Great Seal of Scotland for "giving and granting unto the Honourable "Cospatrick Alexander Home, commonly called Lord Dun-"glas, during the term of his natural life, the office of chamber-"lain and collector of the rents, revenues, feu-duties, and other "casualties of superiority, issuing and payable to the Crown, out "of the lands and lordship of Ettrick Forest, in the shire of "Selkirk, Scotland, in the room of Alexander Pringle, Esq. "deceased, to hold the said office of chamberlain and collector "to the said Cospatrick Alexander Home, commonly called

" Lord Dunglas, during the term of his natural life, with power " to the said Cospatrick Alexander Home, commonly called " Lord Dunglas, from time to time, so long as the commission " subsists, to constitute one or more deputies in the said office, " for whom he shall be answerable, that they shall duly collect " and account for the said feu-duties, and other casualties of the " superiority, in his Majesty's court of Exchequer, in Scotland, " and yearly, and thereafter pay, or cause to be paid, to the " Receiver-General of his Majesty's land-revenues, and casual- " ties in Scotland, for the time being, all such sum and sums of " money as shall appear to be due to his Majesty, upon the end " and determination of each respective account. And to that " end, the Barons of the said Exchequer are hereby required to " cause sufficient security be taken in his Majesty's Remem- " brancer's office from the said Cospatrick Alexander Home, " commonly called Lord Dunglas, before he enters upon the " said office, for his making such yearly account and payment as " aforesaid; and his Majesty, as well in consideration of the said " office, as out of his royal bounty and favour to the said Cos- " patrick Alexander Home, commonly called Lord Dunglas, is " graciously pleased to ordain, that the same letter do contain " his grant unto the said Cospatrick Alexander Home, com- " monly called Lord Dunglas, of an annuity or yearly salary of " L.300 sterling to himself, and L.20 sterling to his deputy or " deputies, to commence from the date of the letters-patent " hereby intended, and to be computed by the day to Martin- " mas now next ensuing, and the subsequent payments half- " yearly, at Whitsunday and Martinmas, by even and equal " portions in time coming, during the term of the natural life of " the said Cospatrick Alexander Home, commonly called Lord " Dunglas, out of the moneys of the said collection, and wherein " they come short, out of the first and readiest of the rents, " revenues, and feu-farms, and other casualties of superiority,

" issuing and payable to the crown out of the lands and lordship " of Dunbar, in Scotland, by the purchasers of the lands of " Spott, and other lands within the sheriffdom of Haddington; " and his Majesty revokes and declares void all former commis- " sions of chamberlain relative to the said revenues; and it is his " Majesty's pleasure that the said grant be extended in the best " and most ample form, with all precepts and clauses that are " needful to be inserted in grants of the like nature."

A commission was accordingly issued under the Great Seal in terms of this warrant, on the 4th of September, 1827. And on the 22d day of September, 1829, the appellant, Lord Dunglas, granted a deputation or factory in favour of the other appellant, Cunningham.

George the Fourth died in the year 1830, and was succeeded by William the Fourth. In February, 1837, the respondents brought an action of reduction against the appellants, for setting aside the above recited warrant, and the commission following upon it, together with the deputation in favour of the appellant Cunningham. The reasons of reduction, after the first or formal one, were, " *secundo*, that George the Fourth had no power or " authority to make, give, or grant the same, at least to the " effect of the said warrant, commission, grant, or letters patent, " enduring, or having effect beyond the period of his said late " majesty's demise. *Tertio*, The said warrant, commission, " grant, or letters patent, under the narrative and disguise of a " grant of the office of chamberlain or collector of the rents and " revenues of Ettrick Forest, was and is unwarrantable, illegal, " and inept, as an alienation, and for a period exceeding the " reign of his majesty, granter thereof, of the whole revenues of " the lands and lordships specified in the said grant, and also of " a large part of the rents and revenues of the lands and lord- " ship of Dunbar. *Quarto*, The said warrant, and the said " commission, grant, or letters patent, in so far as they purport

" to give and grant to the said Honourable Cospatrick Alexan-
" der Home, commonly called Lord Dunglas, for all the days of
" his natural life, an annuity or yearly salary out of the rents,
" revenues, feu-duties, and other casualties of superiority, of the
" lands and lordships of Ettrick Forest and Dunbar, forming
" parts and portions of the hereditary land revenue of the Crown
" in Scotland, were *ultra vires* of his said late Majesty King
" George IV. — inasmuch as the said hereditary revenue, having
" been surrendered without reserve to the disposal of Parliament,
" on the accession of his said late Majesty, was afterwards settled
" upon his said late Majesty for his life only; whereby it was
" beyond the power of his said late Majesty to alienate, burden,
" or affect the same in any way, by grants to have effect or be
" operative beyond the period of his demise. *Quinto*, The
" settlement of the said hereditary revenue made at the accession
" of his said late Majesty, for the period of his natural life, hav-
" ing come to an end upon his demise, such hereditary revenue
" was, upon our accession, again placed by us at the disposal of
" parliament, and by parliament thereafter made part of the
" consolidated fund, and subsequently vested in the Commis-
" sioners of our woods, forests, land revenues, works and build-
" ings, in terms of and for the purposes expressed in the said
" act of the 3d and 4th years of our reign above referred to, and
" the acts therein recited; whereby the said Commissioners have
" now the sole and undoubted right to the whole hereditary and
" land revenues of the Crown in Scotland, whereof the rents,
" revenues, feu-duties, and other casualties of superiority of the
" said lands and lordships of Ettrick forest and Dunbar form
" parts and portions; and farther, by the said illegal grant we
" are prevented, for an indefinite period, from fulfilling the sur-
" render made by us to Parliament of our royal revenues in
" Scotland at the commencement of our reign, as above set
" forth. *Sexto*, The said warrant, and the said grant, letters

" patent, or commission, and the said deputation and factory are " made and granted in violation of our right to nominate and " appoint a chamberlain and collector of the rents, revenues, feu- " duties, and other casualties of superiority issuing and payable " to the Crown out of the said lands of Ettrick forest in the shire " of Selkirk, during our own reign. *Septimo*, For the reasons " above stated, it was incompetent for, and *ultra vires* of, the said " Honourable Cospatrick Alexander Home, commonly called " Lord Dunglas, to grant and subscribe the foresaid deputation " and factory in favour of the said Robert Cunningham." For these reasons, the summons concluded, that the warrant, commission, and deputation should be reduced, and be declared " to " have been from the beginning, to be now, and in all time " coming, void and null, and of no avail, force, strength, or " effect in judgment, or outwith the same; and being so reduced, " the defenders, and all others acting or pretending to have " authority to act for and under them, or either of them, should " be ordained to desist and cease from acting as chamberlain " and collector, or deputy-chamberlain or sub-collector foresaid, " and from collecting or intromitting with the rents, revenues, " feu-duties, and other casualties of superiority issuing and pay- " able as aforesaid, out of the said lands and lordship of Ettrick " Forest, or from uplifting, receiving, or retaining for their or " either of their benefit, any part or portion of the rents, reve- " nues, feu-farms, and other casualties of superiority issuing and " payable as aforesaid, out of the lands and lordship of Dunbar."

In support of their action, the respondents averred, that the lordship of Ettrick Forest was in the reign of James II. annexed to the Crown by the Act 1455, cap. 41. That the barony of Dunbar was also annexed to the Crown in the reign of James III. That the revenue from Ettrick Forest had consisted for a long time of certain feu-duties and casualties. That the crown had been in use to appoint a chamberlain for the collection of this revenue. That

this appointment had been usually bestowed during the pleasure of the Crown. and had been uniformly so given from the period of the Union. down to the time of George IV. That on the accession of George the IVth, he, by 1 Geo. IV. cap. 1, surrendered the hereditary revenues of the Crown to Parliament, and in return a certain annual sum was granted for his civil list, and the hereditary revenue from Scotland was given to him for his life, subject to the same charges upon it as in the previous reign. That when the warrant for the appellant Lord Dunglas's appointment of chamberlain was issued, the revenue from Ettrick Forest was only L.235, 7s. 7d. That it had never in any year since the date of the warrant exceeded that sum. and that the difference between the revenue and the sum granted. had always been made up from the revenue arising from the lordship of Dunbar. That on the accession of William IV., he made the same surrender as George IVth had done, but did not in return receive a grant of the hereditary revenue of Scotland, as that, with the other hereditary revenues, was ordered to be carried to the consolidated fund by 1 Will. IV. cap. 25.

The appellants, in answer, admitted the annexation by the Act 1455, but averred, that it had been dissolved by the Act 1587, cap. 80. And they farther averred, that the Kings of Scotland had from time immemorial given hereditary grants, and grants for life, of offices connected with the administration of the property and collection of the revenues of the Crown. That a chamberlain for Ettrick Forest had been appointed from time immemorial, and the salary had at first been paid out of the moneys collected, but latterly, it had been partly paid out of the revenue of the lordship of Dunbar. That the Act of 1 Geo. IV. cap. 1. did not include the hereditary revenue of Scotland, which was specially excepted from it, as farther confirmed by 1 and 2 Geo. IV. cap. 31. They admitted that the hereditary revenues of the three kingdoms was put on one and the same footing by 1 Wil.

IV. cap. 1., but alleged, that that statute, by its 12th sect. saved the right of the Crown as to the appointment of collectors, and the right of parties who had been appointed, and that this saving was repeated in the 18th sect. of the 3d and 4th Will. IV. cap. 69. which gave the management of the hereditary revenue to the Commissioners of Woods and Forests, and from that period the appointment of the appellants had been recognized by these Commissioners. They admitted the nature and amount of revenues derived from Ettrick Forest.

On these statements, the respondents founded the following pleas:—"1. His late Majesty George IV. had no power or authority to issue the warrant, or grant the letters-patent and commission sought to be reduced, in so far as the same purport to extend beyond the life of the granter, and thereby encroach upon the undoubted rights and prerogatives of his Majesty's royal successors; and the right of Lord Dunglas to the said office, and the salary attached thereto, expired by the demise of his said Majesty George IV.

"II. The warrant, with the letters-patent, and commission following thereon, in so far as they purport to give and grant to Lord Dunglas, for all the days of his natural life, an annuity, or yearly salary, out of the rents, revenues, feu-duties, and other casualties of superiority of the lands and lordship of Ettrick Forest and Dunbar, forming parts and portions of the hereditary land-revenue of the Crown in Scotland, were *ultra vires* of his late Majesty George IV. inasmuch as the said hereditary revenue having been surrendered, without reserve, to the disposal of Parliament, on the accession of his late Majesty, it was afterwards settled upon him by statute for his life only, whereby it was incompetent for his late Majesty to alienate, burden, or affect the same, in any way, by grants, to have effect, or be operative, beyond the period of his demise.

"III. Assuming that, in respect of the preceding pleas, the

" warrant, with the letters-patent, and commission following " thereon, are to be set aside as null and void, it follows, by neces- " sary consequence, that the deputation and factory, granted by " his Lordship to the defender, Captain Cunningham, must also " be reduced, as flowing *a non habente potestatem.*

" IV. The writs libelled being reduced and set aside, the pur- " suers will be entitled to decree against the defenders, discharg- " ing them from continuing to act as chamberlain and collector, " or deputy-chamberlain and sub-collector of Ettrick Forest, " and from collecting or intromitting with, or receiving or retain- " ing, for their own benefit, any part or portion of the Crown- " revenues, payable from the lands and lordship of Ettrick " Forest, or from the lands and lordship of Dunbar.

" V. There are no grounds on which a plea of acquiescence " and homologation can be maintained against the pursuers, in " respect generally of the circumstances of the case, and that the " interests of the Crown cannot be injured by any neglect on the " part of its officers."

The appellants pleaded in answer, — " I. His late Majesty " George IV. did not exceed the powers with which, in right of " the Crown, he was invested, in appointing the defender, Lord " Dunglas, Chamberlain of Ettrick Forest during the whole " period of his life, for the purpose of collecting the revenues of " the Forest, with a salary for the performance of that duty.

" II. The reasons of reduction, in so far as rested on the sup- " position of the hereditary revenues of the Crown of Scotland, " having been surrendered to the disposal of Parliament by his " late Majesty George IV. are ill founded, inasmuch as no sur- " render was ever made, his late Majesty having enjoyed and " possessed the income of his hereditary revenues in Scotland " until his demise.

" III. The defender's appointments are effectually protected " by the provisions of the statutes passed during the reign of his

" late Majesty William IV. in respect that they expressly declare, " 1st, That the hereditary revenues shall only be surrendered " under the burden of all such grants as those in favour of the " defender. 2d, That they shall only be transferred to the con- " solidated fund, under the burden of the annual sums or pen- " sions charged upon them; and 3d, That no appointment of " chamberlain or collector, shall be made void by the passing of " these acts, but that every such chamberlain or collector shall " continue in office until his death or resignation.

" IV. As the defender, Lord Dunglas's appointment, has been " recognized and sanctioned by the Crown since the demise of his " late Majesty King George IV. while the pursuers were in the " full knowledge of its provisions, they are barred by acquiescence " and homologation from reducing it."

There was produced by the respondents in support of their averments, in regard to the appointment of chamberlain of Ettrick Forest, a list shewing that there had been appointments in 1703, during pleasure, with a salary of L.8, 6s. 8d. payable out of the feu-duties, &c. In 1718, an appointment until recalled, with the same salary, payable out of the same fund. Between 1742 and 1768, five appointments during pleasure, with a salary of L.500, with one exception, when it was L.20, payable out of the same sources as the salary of the appellant. In 1786, an appointment to two jointly, and the survivor, during life, and the life of the sovereign. And in 1812, another appointment, during life, without limitation. In both of the last instances, the salary was L.500, payable in the same manner as the appellant's. The last of these appointments, was that which immediately preceded the appointment of the appellant.

There was also produced for the appellants a list of appointments to various Crown offices, such as of forestry and chamberlainship, keepers of castles and palaces, in some instances during the lives of the holders; in others, for the lives of joint grantees;

in others, to them and their heirs, and ranging from the year 1481, to the year 1691.

The Lord Ordinary (*Cunninghame*) ordered cases to the Court; and the Court, upon advising the papers, remitted the cause for the opinion of the other Judges.

Lords *Jeffrey*, *Fullerton*, and *Cunninghame*, concurred in giving a very elaborate opinion, holding, that the grant to the appellant was *ultra vires* of Geo. IV., because it was an alienation of the annexed property of the Crown, and as such illegal, independent of the surrender at the accession of George IV., and because the Crown property was then surrendered, and put at the disposal of Parliament, who granted it back for the period of his Majesty's life only, whereby he was necessarily disabled from binding it in any way beyond that period. One part of this reasoning, from which these conclusions were drawn, was expressed thus: — "We do not think it admits of any serious "doubt, that the alienation, which is here indisputably made "of the hereditary revenue from the succeeding sovereign, can "be in no respect palliated, or varied in its true character, by "being called the salary of a crown-collector. A reasonable "deduction no doubt must be made from feu-duties, as well as "other sources of revenue, for the trouble of collection. But it "would be rather difficult to deduct L.320, in this way, from "L.230; or indeed, to speak seriously of the former sum being a "mere allowance for the trouble of collecting the latter. The "old allowance, it appears, up to 1742, was only L.8, 6s. 8d.; "and even now it is not disputed that the actual collector is "overpaid by a salary of L.20. All beyond this, therefore, is a "mere gratuitous alienation; and might just as well have been "fixed at L.3000 as L.300. If the reigning sovereign, in short, "could not gratuitously settle his whole annexed revenues, in "his old age, on a young favourite for his life, and thus (in all "probability) deprive one or more of his successors of any share

" of them during their whole reigns, we do not see how this " grant can be sustained, merely because the grantee is called a " collector. The truth is, that the grant to the noble defender " is merely a pension, thinly disguised with the name of a salary: " And as it is certain that all pensions, (except upon the Irish " establishment, or with Parliamentary authority,) become legally " void on the demise of the sovereign who bestowed them, it " seems impossible to doubt that this must fall, when challenged, " as it now is, by authority of the successor."

Lord President Hope and *Lord M'Kenzie*, concurred in the result of this opinion, though not in its reasoning throughout, Lord M'Kenzie saying, " I do not consider the grant to the " noble defender, as truly and substantially the grant of an office, " but of a pension." *Lord Moncrieff* concurred in the opinion absolutely, expressing himself as confirmed in the conclusion, because " the grant in question could not be considered as in any " sense a *bona fide* appointment to an office under the Crown." *Lord Cockburn* likewise concurred absolutely, saying, " I con- " ceive the grant to have been palpably illegal, and a mere cover " for a pension under the name of an office; and this pension to " be taken from a part of the royal or public property, with " which the granter had no right to interfere in the way he did " beyond the period of his own life." Lords *Cranstoun* and *Gillies* held, that if the grant were *bona fide* for the collection of the revenue, the Acts 1455, cap. 41, and 1597, cap. 238, had no application, as in that case, the grant was no alienation, and that, at all events, these two acts had fallen into desuetude; they however concurred in the result of Lord Jeffrey's opinion, because they thought " that this is not the *bona fide* " grant of an office, but a mere blind or cover for a gratuitous " alienation of part of the revenue. Considered as an office, it " is a simulate gift, and that appears *ex facie* of the warrant " itself. It never could be seriously meant to give L.320 a-year

" as a fair and reasonable salary for the trouble of collecting " L.230. The plain object in view, was to give a pension under " the name of a salary, which was to subsist, or might subsist, " after the death of the sovereign by whom it was granted.

" We doubt if this would have been competent at common " law, even before the British statutes upon which the pursuers " found, relative to the surrender of the hereditary revenues of " the Crown at the accession of George III. and George IV. " But, putting the same construction upon those statutes which " Lord Jeffrey has done, and which he has enforced by a clear, " and, in our opinion, unanswerable argument, we come to the " conclusion at which he has arrived."

In conformity with these opinions, the Court (*Second Division*) on the 21st December, 1838, pronounced this interlocutor: — " The Lords having resumed consideration of this process, with " the opinions of the consulted Judges, in respect of the opinions " of a majority of the whole Judges, reduce the grant under " challenge, and decern and declare accordingly — repelling, in " so far, the defences against the conclusions of the libel — *Quoad* " *ultra* appoint parties to be farther heard at the bar." Lords *Meadowbank* and *Justice Clerk* (*Boyle*) however, entirely dissented from the opinions given, and Lords *Glenlee* and *Medwyn* concurred, upon the ground that the grant was truly of a pension under the cover of a grant of an office.

The respondents then gave in a minute, renouncing the conclusions in their summons for repetition of the moneys received by the appellants, and thereafter, on the 26th January, 1839, the Court pronounced the following interlocutor: — " The Lords " having resumed consideration of this process, with the minute " for the pursuers, assoilzie the defenders from the conclusion of " the summons for repetition and payment, and decern; reserv- " ing to the pursuers, and all concerned, to insist upon the same " before a competent Court as they shall be advised; and

" reserving to the defenders their answers and defences, as " accords."

The appeal was taken against the two interlocutors of the Court.

Mr Pemberton and Mr Hope for appellants. — The matter at issue by this appeal is one of pure law; it was not within the power, as it does not appear to have been the intention of the Court below to express any opinion upon the propriety of the grant to the appellants. Whether the duties of chamberlain are onerous, or merely nominal? whether the salary attached to the office is only commensurate to the duties to be performed, or excessive? are questions with which the House cannot deal. The only question before it, is, whether the judgment of the Court below, grounded on considerations irrespective of the grant, is well founded in law? and subsidiary to that, whether the judgment can be supported upon the terms of the respondent's summons, and its conclusions?

I. The grant to the appellant was not *ultra vires* of Geo. IV., but was simply the exercise of a right which he and his predecessors, Kings of Scotland, had enjoyed from time immemorial. That the Kings of Scotland have always been in use to make appointments to offices to endure beyond their own reign, is shewn by the list which the appellants produced in the Court below, and which, with farther research, could have been greatly enlarged. That these appointments were within the power of the monarchs is shewn *Ersk.* I. 2. 12, and that they were legal, independent of the effect of usage, and without regard to their effect on the revenue of the succeeding monarch, is confirmed by the grants of the liferent escheat of Crown vassals, by the terms of the acts 1587, cap. 65, and 1685, cap. 9, which recognized

heritable chamberlainships, and for life, by the 20th act of the union, which expressly saves "heritable offices," and "offices for "life," and still more recently by the 3 and 4 Will. IV. cap. 69. No doubt, the act 1597, cap. 238, revoked all grants of chamberlainries and bailieries, but that applied only to heritable grants of these offices, and as to them, only to such as had been made in the minority of the reigning monarch, and the revocations in each instance were not to be valid until sanctioned by Parliament. That this statute did not apply to grants for life, is shewn by the terms of the act 1685, recognizing such grants as then in existence.

II. If the grant be good according to the common law of Scotland, the several British statutes in regard to the hereditary revenue of the Crown do not in any way affect its validity. The hereditary revenues were not touched by the articles of the Union, but were enjoyed by the different monarchs as they had been previous to that treaty, as theirs in right of the Crown, nor were they affected by any statute, until the 1 Geo. II. cap 1, which declares, that they should be levied in the same manner as they had been during the reign of George I. Under this statute they were collected and applied separately from the English revenue.

On the accession of Geo. III. the hereditary revenues of England and Ireland were, by 1 Geo. III. cap. 1, carried to the aggregate fund, and out of this fund his majesty received, in lieu of the revenue, a yearly income of L.723,000; but the hereditary revenues of Scotland were not included in this arrangement, but by the 8th section of the statute, were to continue to be drawn as they had been previously, with an express saving of all charges upon them in favour of any of the subjects. The 27 Geo. III. cap. 13, substituted the "consolidated" for the "aggregate" fund, and, to guard against any doubt whether the hereditary

revenue of Scotland was embraced in the arrangement, the statute 28 Geo. III. cap. 33, was passed, declaring expressly that it was not included.

The same arrangement as in the case of Geo. III. was continued on the accession of Geo. IV., by the acts 1 Geo. IV. cap. 1 and 2, and 1 and 2 Geo. IV. cap. 31, with the like saving of the rights of the subject.

On the accession of William IV. the hereditary revenue of Scotland was, for the first time, carried to the consolidated fund, by 1 Will. IV. cap. 25, but with an express saving, in the 12th section, of all "rights or powers of control, management, or "direction," which had been exercised by the Crown, and of "all grants, claims, and demand," of any of the subjects in, to, or out of the revenue.

The 2 and 3 Will. IV. cap. 112, vested the management of the revenue in the Commissioners of Woods and Forests, instead of the Exchequer. This was continued by 3 and 4 Will. IV. cap. 69, which enacted that the revenues should be applied, "in the first "place, in payment of the costs, charges, and expenses attend- "ing the management of the said lands and other property, and "subjects of the Crown. In the next place, in payment and "discharge of any annual sum or sums of money, or any pen- "sions already lawfully charged, or to be charged thereon "respectively." And "that the passing of this act shall not vacate "the appointment of any chamberlain or collector of the revenues "and profits of any of his Majesty's lands, or other property or "subjects to which this act relates, or vacate, render void or "voidable any security given by or for such chamberlain or "collector, but every such chamberlain or collector who shall be "in office at the time of the passing of this act, shall continue in "office until his death or resignation, or until he shall be removed "by the Commissioners for the time being, of his Majesty's "woods, forests, land revenues, works, and buildings, or until

" his appointment shall cease under the provisions herein con-
" tained or referred to." — " Provided always, and be it farther
" enacted, that nothing herein contained shall extend, or be
" construed to extend to abridge or interfere with any rights of
" his Majesty, his heirs or successors, or of the Lord High
" Treasurer or the Commissioners of his Majesty's Treasury, or
" the Chancellor of the Exchequer for the time being, or any
" grantee of the Crown, in respect of any appointment lawfully
" made by his Majesty or the said Lord High Treasurer or
" Commissioners, or the Chancellor of the Exchequer, or such
" grantee previously to the passing of this act."

Therefore, until the reign of William IV., the sovereign enjoyed the same rights in regard to the Scottish hereditary revenue that his predecessors had done previous to the Union, and the act of Will. IV. expressly saved all grants and appointments lawfully made previous to its date. The grant to the appellant was lawfully made in exercise of a right always enjoyed by the sovereign, and is therefore unaffected by this statute of Will. IV.

III. If the grant of the office for life is consistent with law, in respect of its endurance, there is nothing in the other terms of the grant to make it illegal. The office of chamberlain is necessary for the collection of the Crown revenue, and is admitted to have existed from time immemorial, and with a salary annexed to it. It is said, however, that the amount of salary annexed to the grant, shews that it is in truth the grant of a pension. The distinction between a grant of an office with a salary, and the grant of a pension merely, are plainly distinguishable in law. The office here is not created for the first time, to be a cover to the grant of the yearly payment, but was subsisting, and must subsist, for the collection of the revenue. If the Crown had power to grant the office, it had power to fix the salary. It is not possible, therefore, to enter upon a consideration of the

amount of the salary without interfering with the royal prerogative. There is no authority to shew that such a power is vested in the Courts of law. The same principle which would warrant the exercise of such a power, would justify an inquiry into the validity of the grant upon any other supposeable objection, such as the inadequacy of the salary, the incompetency of the party for the office, and the like. But so far as the amount of the salary can affect the question, it is less by L.200 per annum, than it had been for 80 years previous.

IV. Neither can the grant be said to be an alienation of the Crown property. The property is no way parted with, but remains in the Crown as it did previous to the grant, and although the salary may exhaust the revenue to be collected, that will not support the argument in favour either of pension or alienation. The revenue from Ettrick Forest consists of a great variety of small duties. These, notwithstanding the grant, are still vested in the Crown, but their collection may give much more trouble to the collector than payments of much larger amount, so as to make his remuneration exceed his receipts; yet it may be necessary to enforce the payments in order to preserve evidence of the tenure. And when the office returns into the hands of the Crown so will the regulation of the amount of income. That the deficiency of the revenue for payment of the salary was to be made up out of the revenues from the lordship of Dunbar, does not alter the case. If the whole salary had been made payable from the Exchequer, the chamberlain paying over, in the first place, the amount of his receipts, it might have been argued whether the salary was proportionate, but it could never have been maintained that the grant was an alienation. It cannot then make any difference, that a part of the salary is made payable out of a particular source of revenue, instead of being charged on the aggregate receipts.

V. If the grant be challengeable, as in truth the grant of a pension, it cannot be challenged under this summons. There is no allegation, that intending to grant a pension, a grant of the office was given to cover the pension; neither is there any allegation of an excess in the amount of the salary, and no one of the reasons of reduction quarrel the grant upon either of these grounds in any thing like a substantive form.

Mr Attorney General, and Mr Anderson, for the respondents. — I. The Crown can only grant offices as they have been granted in ancient times, unless altered by Parliament. The right must be exercised according to usage, and what has been held during pleasure cannot be granted for life. In the present instance, whatever may have been the earlier history of the chamberlainship of Ettrick Forest, the earliest grant of it shewn was in 1703, during pleasure, and so it continued until the year 1786, when, for the first time, a grant for the life of the grantee was made, and this grant, with the exception of that to the appellant, is the only instance of a grant beyond the life of the sovereign.

II. By the act 1455, cap. 41, Ettrick Forest, and by the act 1487, cap. 112, the lordship of Dunbar, were both annexed to the Crown, and by the act 1597, cap. 235, all "pensions, gifts, "or dispositions whatsomever," of the annexed property, are declared to be null and void, which was farther enforced by cap. 242 of the same act. All these statutes were especially confirmed by the act 1633, cap. 10, and are, by the institutional writers, held as being in force, *Stair*, II. 3. 35; *Bank.* vol. I. p. 538; *Ersk.* II. 3. 14, and received effect in Advocate *v.* Morton, *Mor.* 7859; Advocate *v.* Moncrieff, *Mor.* 3460; Dun, *Mor.* 3462: and moreover, being in relation to public policy, these statutes could not fall into desuetude, *Ersk.* Prin. I. 1. 16; Wilson *v.* Queensferry, *Mor.* 1835; Jack *v.* Stirling, *Mor.*

1838; Anderson *v.* Wick, *Mor.* 8463. Whatever effect possession, in the instances given by the appellant of grants contrary to the statute, might have upon these individual instances, it could not free others from the enactments of the statutes. By the grant to the appellant the whole revenue of Ettrick Forest, and a part of the revenue of the lordship of Dunbar, are made over by the sovereign, not for his own life, but the life of the grantee. No doubt, the revenue is given in the *name* of salary, and the grantee is *called* a chamberlain, but the substance is not the less an alienation of this part of the annexed property, and therefore void under the ancient statute law. This view was taken by the Barons of Exchequer in regard to the chamberlainship of Ross in the year 1720. In that case they refused to pass a signature for a grant of the office during the life of the Earl of Sutherland, because, by the laws relating to the annexed property, "the sovereign can make no grant thereof for any longer "time than during his own life," but they passed one for the Earl's life should his Majesty so long live. Barons Clerk and Scrope, who were on the bench during these proceedings, afterwards prepared a treatise on the forms and powers of the Court of Exchequer, which was subsequently printed, wherein, under the word "gifts," they enforced the principles on which the signature of the Earl of Sutherland had not been allowed to pass.

[*Lord Brougham.* — How had the Court of Exchequer jurisdiction? The opinions of the Barons must have been quite extrajudicial.]

As a judicial opinion, no doubt, what fell from them cannot have weight, but it is of great value, as shewing the opinions of those who had the administration of the royal revenue.

[*Lord Brougham.* — No better than any thing that might fall from the Chief Justice of the King's Bench during a vacancy in the office of Chancellor of Exchequer, which the Chief Justice, *ex officio*, fills during that time.]

III. The grant to the appellant was farther *ultra vires* of George IV., inasmuch as by the arrangement which took place on his accession to the throne, the hereditary revenue was placed at the disposal of Parliament, and beyond his control. George III., at his accession, surrendered to Parliament "the hereditary revenue" generally; this of course included the revenue of the United Kingdom, not of England and Ireland only, to the exclusion of Scotland; and by the 8th section of 1 Geo. III. cap. 1, Parliament granted the Scotch hereditary revenue back to the sovereign, declaring, that the respective "revenues and duties" payable in Scotland should be enjoyed by his Majesty during his life. An arrangement in precisely the same terms, and embracing the same matters, was made on the accession of George IV. That monarch, therefore, enjoyed the hereditary revenue of Scotland under a grant from Parliament, and for his life only, and consequently, any grant by him to endure beyond his own life must be void, and cannot bind his successors.

IV. The grant of the L.300 pound a-year, whether it be called salary, pension, or annuity, is quite independent of the grant of the office; it is as well "in consideration of the said office as out "of his royal bounty."

[*Lord Brougham.* — Can any other warrant be produced having the words "royal bounty?"]

None; but these words were probably introduced when the salary was raised. A grant of the office merely, with all perquisites, &c., thereto belonging, would not have carried more than the ancient salary of L.100 Scots, or L.8, 6s. 8d. But the grant here of L.300, and L.20 to the deputy, is quite distinct from the grant of the office, and it is, in truth, neither more nor less than a pension out of the royal bounty, with a colour given to it by coupling it with the grant of an office, and calling it a salary.

Mr Attorney General, at concluding, said he should claim the

right on behalf of the Crown to reply, when the counsel for the respondent should have concluded his reply.

[*Lord Brougham.* — We understand there are three instances where this claim was not allowed, but we don't know whether the matter was argued. There is no precedent for it in the Courts of Scotland, from which this appeal is brought.]

There is no order of the House against it, and the prerogative is founded on this, that the officers of the Crown are supposed to assist in the administering of justice, and not to conceal or impede it. If the claim is allowed, I shall not, in this instance, exercise it. I only claim the right.

Mr Pemberton, in reply. — There have been many instances where the right to have the last word might have been, but was not claimed by the Crown. This would argue against the existence of the right. Certainly no such right exists in the case of informations by the Commissioners of Woods and Forests; and in charity cases, where the Attorney General sues without a relator, there is no instance of the right having been allowed on the argument of exceptions, demurrer, or motion.

[*Lord Brougham.* — If any case should be discovered affording a precedent, we will act upon it.]

If an office have been in use to be granted in a particular form, no doubt this form must be continued, but that is not the case made upon the record; there is no allegation in it of any particular form or period of endurance in grants of the office in question. There is no proof of usage prior to 1712, and since then the grant has never been identical either in form or duration. And instances of grants of offices, not only for life, but in fee, are numerous in the history of Scotland.

[*Lord Brougham.* — The office of first Criminal Judge, the Justice General, was in fee, and exercised.]

As we do not found on any ancient or universal usage, what has been said upon this subject, in regard to the amount of the

salary, is quite immaterial; the only question is, whether any statute provides that the Crown shall not grant above a certain amount of salary. If the effect of the annexation acts is to declare that a salary cannot be given out of the hereditary revenue, then there is an end of the power to grant the office at all, supposing it otherwise competent; and if there be a power to grant the office with a salary, the power may be abused, but this can never be said to be an alienation. The amount of the salary might be important in considering whether there was an intention to create a new office, and under form of a grant of the office, to give a pension, inasmuch as the Crown cannot create a new office if the salary is to come from a tax on the subject; but this consideration cannot arise here, where the office had existed from time immemorial, and for nearly 100 years, with a greater salary than that given.

LORD BROUGHAM. — In January, 1827, a warrant under the Sign Manual, and in September of the same year, a grant under the Great Seal of Scotland, was issued to the appellant, purporting to confer upon him for life the office of "chamberlain and "collector of the rents, revenues, fines, duties, and other casual-"ties of superiority issuing and payable to the Crown out of the "lands and lordships of Ettrick Forest," with power to appoint a deputy or deputies. There is added the farther grant of an annuity or yearly salary of L.300 to Lord Dunglas himself, and L.20 to his deputy or deputies, and this annuity or salary of L.320 a-year is stated to be "as well in consideration of the said "office as out of his Majesty's royal bounty and favour to the "said grantee." The rents and feu rents are admitted, upon the pleadings, to consist of money payments, which amount to the fixed sum of L.235, 7s. 7½d. and never have exceeded that sum. The warrant and grant provide, that if the annuity or salary of L.320 cannot be obtained from the rents of Ettrick Forest, the

difference shall be made good out of the Crown revenues in the lordship of Dunbar.

An action of reduction of this grant was brought first by the Lord Advocate on behalf of the Crown, and of the Commissioners of Woods and Forests, and upon an objection being taken to the competency of the parties, the action was afterwards brought by the Officers of State, with the concurrence of the Lord Advocate on behalf of the Commissioners. The Court of Session sustained the objection to the competency of the action as first brought, and this formed the subject of an appeal. They also, by a majority of the consulted Judges, sustained the reasons of reduction, and set aside the grant decreeing the defendant to make repayment of the sums received by him since the first demise of the Crown which happened after the grant, that is since June, 1830.

It does not seem necessary to go into many of the reasons upon which this decision proceeded; one is sufficient to set aside this grant. There can be no ground whatever for treating it as the grant of an office. It was, to all intents and purposes, the grant of a pension. This appears clearly enough even from the language of the grant; but the annexation of a salary of L.320, for collecting a revenue of L.235, at once shews that it was a pension out of the land revenue, which was granted under the colour or disguise of granting an office. Nor does this disparity appear to have been matter of any doubt when the grant was made, for provision is expressly made, that "whenever the moneys "of the said collection come short," that is, the moneys for collecting which the salaries were granted, payment shall be made out of the Crown rents of Dunbar. This grant, therefore, was merely colourable as the grant of an office, it was a shift for the grant of a pension, which could not be granted to endure beyond the life of the Sovereign granting it, and being charged on the land revenues, it was in fact an alienation of a portion of that revenue. If the Sovereign could grant L.300 a-year out of

that revenue, he might have granted the whole, and if he could grant any portion of it during the life of the grantee, there is no conceivable reason why he might not, in like manner, have granted the whole away from the Crown in perpetuity.

It thus becomes unnecessary to consider what power the Crown has of granting the office of chamberlain for life of the grantee, because this was in truth no grant of the office. But it may be observed, that a very strong opinion was given by the learned Judges of the Exchequer in Scotland, where a grant for life had been made of the chamberlainship of Ross, and L.500 per annum in 1721 to Lord Sutherland. Their Lordships remonstrated with the Treasury on the ground expressly stated by them, that no such grant could be made either for life or years. Although this may be said to be in some sort an extra-judicial opinion, it is yet entitled to great respect, considering the quarter from which it comes. It is well known, that, to say nothing of such opinions taken in ancient times, there was one of great celebrity taken early in the last century. An important principle respecting the constitutional power of the King, in this country, rests upon the opinion taken in the time of George First, the Judges reporting their opinion, that the care and disposal of the children of the royal family belongs to the reigning Sovereign. The law on this point has ever since been regarded as settled by that report.

An objection has been taken by the appellant, on the ground, that the summons gives no reason of reduction, which raises the question, whether the grant was a *bona fide* gift of the office, or only a pension under colour of such a gift. But supposing that it were necessary to specify the reasons in the summons, and that the general words at the conclusion could not cover the particular reasons; and supposing that the second reasons of the supplemental summons, denying the power of the King to make such a grant, were not sufficient, still there seem to be particular

words quite sufficient for the purpose. The third reason of reduction in the summons at the instance of the Officers of State, expressly states the grant to be illegal and inept as an alienation, and for a period beyond the King's life, "under the narrative "and disguise of a grant of the office of chamberlain." This seems to be the very reason in question.

It has become unnecessary to examine how far the surrender and enactments at the commencement of their reigns have in recent times tied up the hands of the successive Sovereigns. There appears, however, no reason for coming to a different conclusion on this subject from that which several of the Judges below have arrived at, particularly Lord Jeffrey, after a very careful and able examination of the civil list acts. The grant of the pension, in this case, appears to be wholly inconsistent with those provisions. The judgment, therefore, which is appealed from in the reduction must be affirmed.

Lord Campbell. — My Lords, I would merely take notice of one single point which arose, to which my noble and learned friend has referred, namely, the construction of the civil list acts. It seems to me that the learned Judges below have thrown out some expressions upon that subject which are hardly to be defended, because they supposed, that the King, by his speech, surrendered all his land revenues for ever, to the use of the public, and that there was only a re-grant by act of Parliament for his own life. It seems to me that that is an erroneous view of the subject, because the King's speech would operate nothing, it was only an intention indicated by the Sovereign, that the Sovereign was willing to enter into such an arrangement if Parliament should approve of it; and all these civil list arrangements are only for the life of the Sovereign, and are carried into effect by act of Parliament. With this qualification I entirely agree in the view taken by the learned Judges in the Court below, who considered this as a mere disguise for granting a pension

under the name of an office; and I think that the third reason is quite apparent, and covers it most expressly, though I think one of the learned Judges intimates his opinion, that the objection is not raised. It seems to me that this is clearly the grant of an annuity under the name of an office, and that the annuity undoubtedly fell in upon the death of the sovereign granting it.

Lord Brougham. — I ought to mention to your Lordships, that my noble and learned friend, (*Lord Cottenham,*) who is not now present, entirely agrees with my noble and learned friend and myself in our view of the case. The main ground upon which I wished to look into the case was, to see that the objection was raised, by the pleadings, as I thought that there must be some ground for the formal objection which was urged; but when we come to look at it, the word "disguise" puts it out of question. I move that the interlocutors be affirmed.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors, so far as therein complained of, be affirmed.

PEMBERTON, CRAWLEY, and GARDNER — SPOTTISWOODE and ROBERTSON, Agents.

[Heard, *5th July.*—Judgment, *2d August*, 1842.]

CHARLES HENRY GORDON, Esq., *Appellant.*

MRS LOUISA CAMPBELL, *Respondent.*

Inhibition. — *Ranking and Sale.* — In a competition under a ranking and sale, between an inhibiting creditor who had not sued out adjudication against his debtor, and a posterior heritable creditor infeft, *found*, that the inhibiter, in addition to the dividend which she would draw as in a *pari passu* ranking with the other creditors, in whose favour the ranking and sale operated as a general adjudication for behoof of all, was entitled to draw back from the heritable creditor such a sum as would increase her dividend to what it would have been had his debt not been in the field; but that she was not entitled to have the benefit of the heritable creditor's security to the effect of drawing full payment out of the money drawn by the heritable creditor.

ON the 20th of June, 1818, Walter S. Glas borrowed from Campbell L.1500 upon his own acceptance. Glas repaid L.500, and for the balance Campbell brought action against him, and used inhibition on the dependance, by execution which was registered on the 18th of January, 1822. At this time, the only real estate of which W. S. Glas was possessed were certain subjects in the burgh of Stirling.

On the 3d August, 1822, Dr Glas, the father of W. S. Glas, died, leaving considerable heritable property, to which W. S. Glas succeeded as his heir-at-law.

In 1827 W. S. Glas borrowed L.6000 of Gordon, and, in security of its repayment, gave him a bond and disposition of the lands which he had inherited from his father, and of the subjects in the burgh of Stirling. Gordon took infeftment upon this

bond in the lands derived from Dr Glas on the 10th November, 1827, which he put upon record on the 9th of January, 1828; and in the subjects in the burgh of Stirling on the 12th November, 1827, which he put upon record on the same day.

In June, 1831, a process of ranking and sale of W. S. Glas's estates was raised, which was not prosecuted under the 6 Geo. IV. cap. 120, but under the old form of process. Subsequently to the bringing of this action, creditors of Dr Glas brought actions for constituting their debts, and obtained decrees in them.

In the process of ranking and sale, claims and interests were lodged for Campbell and Gordon respectively. The common agent reported upon these claims that Campbell would be entitled to draw back from any dividend which might be allocated to Gordon, such a sum as would put her in the same situation as if the disposition had not been granted to Gordon, inasmuch as it had been granted subsequent to her inhibition; but that Campbell's inhibition could not have any effect against debts contracted by Dr Glas in his lifetime, or by W. S. Glas prior to the inhibition.

Campbell objected to this report, on the ground, that as the creditors of Dr Glas had not constituted their debts until after the bringing of the ranking and sale, and the decree in it drew back to the date of the summons, operating as a general adjudication in favour of all; they ought not to be preferred to her whose inhibition had been used long prior to the ranking and sale; but she did not attempt to controvert the view taken by the common agent of her rights as between her and Gordon.

After certain procedure not necessary to be adverted to, Gordon's heritable debt was held to be preferable on the lands of W. S. Glas, and he was allowed, by interim warrants of the Court, to draw L.5500 of the price of the lands, on condition of his consigning L.2000 to answer Campbell's claim, under her inhibition, on the final result of the ranking.

On the 18th February, 1840, the Lord Ordinary (Cun-

ninghame) remitted to James Webster, S.S.C., "to make out a "state, shewing the ranking of the claim of Mrs Campbell, "giving effect to the inhibition used on her debt against the "common debtor Mr Glas, and having regard to the common "statements and pleas of Mrs Campbell, and of Mr Gordon, "respectively," and to report the same.

Webster, in his report, stated at length the grounds taken by Campbell for preferring his debt to those contracted by Dr Glas, and his (Webster's) reasons for disregarding them, and preferring the creditors of Dr Glas. Assuming this to be correct in principle, Webster prepared a scheme, in which he stated the whole debts due by W. S. Glas, whether on his own account, or as representing his father, and the amount of the divisible fund after deducting the sums which Gordon had been allowed to uplift. He then apportioned the fund, as it existed originally before these deductions, among the creditors, excluding Gordon, and the other creditors, whose debts had been contracted by W. S. Glas subsequent to Campbell's inhibition. In this view, the dividend payable to Campbell was made to be L.748, 16s. 11d. He then apportioned, among the same creditors, the fund as it existed after allowing the deductions. In this view, the dividend payable to Campbell was made to be only L.177, 11s. 11d, shewing a difference betweeen the two views of L.571, 5s. He then allocated this deficiency of L.571, 5s. upon Gordon and the other creditors, whose debts had been contracted subsequently to Campbell's inhibition, and in this way, adding the L.571, 5s. to the L.177, 11s. 11d., he brought out the dividend, to which Campbell was entitled, to be L.748, 16s. 11d., the same amount as she would have drawn if Gordon and the other last mentioned creditors' debts had not been admitted into the ranking.

Campbell objected to the scheme prepared by Webster, upon various grounds, but none of them impeaching the mode in which the inhibition was made to affect Gordon's security.

GORDON v. CAMPBELL. — 2d August, 1842.

On the 2d December, 1840, the Lord Ordinary pronounced the following interlocutor: — "The Lord Ordinary having con- "sidered the report of the common agent as to the effect of the "inhibition used by one of Mrs Campbell's authors against Mr "W. S. Glas in December 1821 — approves of the common "agent's report on that matter, and appoints Mrs Campbell to "be ranked and preferred in terms thereof; *quoad ultra*, repels "the objections of Mrs Campbell to the said report, and "decerns."

Campbell reclaimed against this interlocutor, by a note which prayed the Court "to recal the interlocutor submitted to re- "view; to sustain the objections to the common agent's report "so far as repelled by the Lord Ordinary, and to rank and pre- "fer the objector for the full amount of principal and interest "upon the fund *in medio;* or, in any event, to find the objector "entitled, under the inhibition used by her author, to rank upon "the price of the subjects sold by the common agent which be- "longed to said W. S. Glas, in his own right, prior to his "succession to his father's heritage, without reference to the "alleged claims of the creditors of his said father, and to prefer "her on the funds accordingly; to find her entitled to the ex- "penses of this discussion; or to do otherwise in the premises as "to your Lordships shall seem just."

At the advising of this note, Campbell for the first time insisted that, as against Gordon, she was entitled to have full payment out of the fund allocated to him, inasmuch as his bond had been executed subsequently to her inhibition. The Court, on the 26th February, 1841, sustained this plea by an interlocutor in these terms: — "Recal the interlocutor of the Lord Ordinary "reclaimed against; find that Mr Gordon is preferable to the "creditors, other than Mrs Campbell, for the amount of his "debt, by virtue of his heritable security; but find that Mrs "Campbell, by virtue of the inhibition pleaded by her, is entitled

" to draw back from Mr Gordon the amount of her debt on " which the inhibition proceeded: Find no expenses due, and " decern." The observations which fell from the Court, will be found in 3 *D. B. M.* and *D.* 634.

Pemberton and Anderson for appellant. — Inhibition is merely a personal prohibition to the debtor to do any thing to the prejudice of the inhibitor; it does not give any active lien, and is of no avail unless a sale is made, or debt contracted. If the sale be voluntary, and followed by infeftment, the lands are effectually cut off from all subsequent diligence at the instance of the seller's creditors; but in the hands of the purchaser they are liable to be adjudged by prior inhibitors, after reduction of the sale *ex capite inhibitionis*, Monro, *Mor.* app. Inhibition, No. 1; M'Lure *v.* Baird, 12 *F. C.* 26; Lennox *v.* Robertson, *Hume's Cases*, p. 242, Stormonth, *Hailes*, 933. Had the respondent used adjudication before the institution of the ranking and sale, and no other creditor had followed the example within a year and day, she would then have had a preferable claim over the anterior creditors, and in the state of the fund, she would in that case have drawn full payment to the total exclusion of the appellant. But the interlocutor in the ranking and sale under the 10th sect. of 54 Geo. III. cap. 137, operated as a general adjudication in favour of every creditor, to the exclusion of any separate adjudication by individual creditors, Carlyle, *Kilk.* 285. The respondent, therefore, not only has not any active preferable title by adjudication, but is not in a situation to procure such a title, so as to admit of the introduction of the principle, that where, in a competition, a party is *in titulo* to obtain a preferable title, he shall not be put to the circuity and expense of obtaining it, but shall have his rights adjudged, as if he had already obtained it.

The respondent is merely a personal creditor, having a *pari passu* preference with the other creditors, and no right of absolute

preference except the negative right, which her inhibition gave her against those creditors whose debts were contracted subsequent to it. On the other hand, the appellant, by virtue of his heritable security, had a right of preference over all the creditors of W. S. Glas, except the respondent in respect of her inhibition. The effect of the inhibition was not however to place the respondent in the appellants' shoes, and give her the benefit of the appellant's preferable security, but merely to entitle her to such a share of the fund *in medio*, as in a *pari passu* preference with the other personal creditors she would have had in case the appellant had not been in the field; in other words, the effect of the inhibition is to prevent any prejudice to the respondent by the appellant's security, but not to entitle her to any advantage from it. All the institutional writers agree as to the effect of an inhibition, *Stair*, IV. 35; *Bank.* I. 7. 142; *Ersk.* II. 11. 14 — 16; 1 *Ross Lect.* 488; 2 *Bell Com.* 514, 519; *Bell Prin.* sect. 2393; and the point was expressly decided in Cockburn's ranking, *Mor.* 2883; in Miln *v.* Nicolson, *Mor.* 2876; Cockburn's ranking, *Mor.* 2877, and 2885.

[*Lord Brougham.* — Was this point argued in the Court below?]

Yes. But not one of these authorities was cited. The point was a surprise upon the appellant. These cases settled the law, and the point has never since been mooted. In Ferrier *v.* Pennycuick, 14 *F. C.* 737, it was not raised, but it was referred to by the Judges as settled in law by these decisions.

M'Conochie and Bailey (Sir John) for the respondent. — Inhibition is no doubt a prohibitory diligence, but it strikes against all voluntary alienations or heritable burdens, and preserves the estate of the inhibited in the same condition as if neither had occurred, and is effectual as well against subsequent acquisitions, as present possessions. No doubt the creditors of Dr Glas, if

they had availed themselves of the Act 1661, cap. 24, and used diligence against their debtor's lands within three years of his death, would have established a preference over the creditors of W. S. Glas, over even the respondent his inhibiting creditor; but having omitted to do so, they come in only in the same rank as the ordinary personal creditors of W. S. Glas, against whom the inhibition is to receive effect. Although in the ordinary case, inhibition can be rendered active only by adjudication, that is not necessary in every case, as was decided in Munro, *Mor.* voce Inhibition, app. Pt. 1. where the inhibiting creditor having become purchaser of the lands of the common debtor, and having obtained infeftment, was preferred upon his inhibition to prior creditors, who had used arrestment only, although the inhibition had not been followed by adjudication. Again, in Lennox *v.* Robertson, and Dennistoun, 19th Nov. 1790, *Hume's Dec.* an inhibiting creditor was preferred upon the price of the debtor's lands, in the hands of a purchaser, who had obtained infeftment, although he had not sued out adjudication.

[*Lord Campbell.* — These cases suppose that the creditors had not adjudged, and that the inhibiting creditor *only* could adjudge, but can *that* be said where there has been a ranking and sale?]

Yes. In the case of M'Lure *v.* Baird, 19th Nov. 1807, 12 F. C. 26, the arresting creditors had adjudged, but the inhibiting creditor was preferred nevertheless, without the necessity of his leading adjudication; that which had been led by him being informal.

In Horsburgh *v.* Davidson, 10th June, 1750, *Elchies*, vol. 1. adjudication was dispensed with as unnecessary to complete the diligence of the inhibiting creditor as against adjudging creditors, inasmuch as the adjudications of these creditors were excluded by infeftment taken by the inhibiter, upon a security obtained by him subsequent to his inhibition, and could not compete with adjudication, if led by the inhibiter.

No doubt a ranking and sale stops all preference, but here the preference was created prior to that process. The infeftment of Gordon necessarily excluded all the creditors, except the respondent, who, by virtue of her inhibition, had a right to reduce Gordon's infeftment as taken *spreta inhibitione*. This was a right which the ranking could not give the other creditors a title to participate in, and could not exclude the respondent from the benefit of. Ranking and sale will not bar an adjudication in implement, Simpson and Graham, 10 *Sh.* 66, nor prevent an heritable creditor executing a power of sale, Hutchison *v.* Cameron's Trs. 8. *Sh.* 982; neither could it here interfere with the right acquired by the respondent, previously to its institution to reduce the appellant's bond, and adjudge the lands.

Pemberton in reply. — The cases of Munro and M'Lure, merely establish that, where the lands are by sale or otherwise put beyond the reach of creditors who have arrestment only, and cannot be attached by them by adjudication, these creditors cannot compete with an inhibiting creditor, from whom the right of adjudging is not taken away, and that when that right of adjudging exists, without question the Court will give the inhibiting creditor the benefit of his diligence, without putting him to the expense of completing his diligence; but none of the cases controvert the principle laid down in the ranking of Cockburn's creditors, and the other authorities which have been cited, that the inhibiting creditor cannot be benefited by posterior rights, but is only not to be prejudiced by them. The ranking and sale operates as an adjudication in favour of the other creditors, as well as the respondent, and reduces her to a *pari passu* ranking with them, and all that her inhibition entitles her to, is to draw such a dividend as the fund would have yielded her in such a ranking, had the appellant's debt not been in the field. But the effect of the interlocutor appealed from, is not to remove the appellant's debt, so far as it prejudices the respondent in the ranking, but to trans-

fer to her the benefit of the security. This, none of the authorities warrant, but, on the contrary, expressly negative.

LORD CAMPBELL. — This is a case of considerable importance to the law of Scotland; and although I confess that I feel a strong opinion upon it at present, yet I should like to have an opportunity of referring to the authorities, to see whether the principles laid down so very deliberately in Lanton's case, and recognized by all the text writers, have been at all broken in upon by the two cases of Munro and M'Lure. I hope it will turn out that they may all be reconciled; but if there is any difference, I should certainly be strongly inclined to adhere to the law which was deliberately laid down at the end of the seventeenth century, upon the principle that the inhibitor is not to be prejudiced, and is not to be profited by any subsequent security.

Lord Brougham. — We will let it stand over.

LORD CAMPBELL. — My Lords, since this case was argued at the bar, I have very deliberately considered it, and the impression on my mind at the close of the argument being strengthened, I do not now hesitate to advise your Lordships to reverse the interlocutor complained of. If the authorities brought to our notice had been cited before the learned Judges of the First Division of the Court of Session, (which we understand they were not,) I cannot help thinking that this interlocutor would not have been pronounced; for there seems no part of the law of Scotland better established, than that upon which the present case depends.

The question is, whether an inhibiter, under the circumstances, is to be placed in a better situation than he would have been in, if the transaction contrary to the inhibition had never taken place?

This question does not appear upon the record, and was raised

for the first time at the hearing in presence before the Inner House, upon an appeal respecting other matters from the Lord Ordinary, before whom no objection was made to the report of the common agent, on the ground that it did not award payment in full to the inhibiter.

It has been contended by the appellants, that it was not competent to the respondents in that stage of the proceeding, to make this objection; but I do not consider it necessary to determine whether it was so or not, as the objection to the report of the common agent appears to me to be entirely unfounded on its merits. The general rule, as laid down by all the institutional writers, ancient and modern, and founded on very solemn decisions, is, that inhibition being only a negative, or prohibitory diligence, the inhibiter can neither be prejudiced nor benefited by a transaction *spreta inhibitione*.

But this rule is said to have been broken in upon by the cases of Munro of Poyntzfield, M'Lure *v.* Baird, and Lennox *v.* Robertson. Of these cases, it is enough at present to say, that they do not apply; for supposing that, upon an alienation of the estate, where the inhibiter may adjudge, he is entitled to be paid in full, in this case, the inhibiter could not adjudge, for by the ranking and sale under the bankrupt Act, neither the inhibiter nor any other creditor could have raised adjudication against any part of the lands or property embraced in the ranking and sale.

There is nothing to take this case out of the general rule respecting inhibition, as the inhibiter could not by any diligence have placed himself in a better situation than he is placed in by the report of the common agent, if the inhibition had been strictly respected, and the bond had never been executed.

I therefore move your Lordships, that the interlocutor be reversed.

Lord Brougham. — I entirely agree with my noble and learned friend, and I believe my noble and learned friend, who is

not here, who heard the case with us, is entirely of the same opinion.

Mr Anderson. — Will your Lordships give us the costs in the Court below; the Lord Ordinary found us entitled to the costs, but the Inner House, reversing that interlocutor, gave costs against us.

Lord Brougham. — No. My Lords, I should say nothing about costs.

Mr Anderson. — Your Lordships just affirm the Lord Ordinary's interlocutor.

Lord Brougham. — Yes.

Ordered and Adjudged, That the interlocutor, so far as complained of, be reversed.

BRUNDRETT, RANDAL, and BROWN — WM. BELL, Agents.

[Heard, *4th March.* — Judgment, *2d August*, 1842.]

JAMES HAMILTON, Clerk to the Signet, *Appellant.*

JOHN WRIGHT and Others, Trustees of the deceased Thomas Wright, *Respondents.*

Trust. — A trustee, under a deed of arrangement between an insolvent and his creditors, whereby the whole of the insolvent's *acquisita et acquirenda*, were vested in the trustee, for payment of the creditors, if, while the trust is subsisting, he acquire right to a subsequent debt contracted by the insolvent, does so for the trust, and must communicate to it all the benefit of the acquisition.

Ibid. — A trustee must not put himself in a position which may have a tendency to injure the trust, or interfere with his duty.

Trust. — *Sale.* — A purchase by a trustee, under a trust for payment of creditors, of a debt owing by the insolvent, will be void by reason of the knowledge which his position as trustee enables the purchaser to acquire.

ON the 16th day of October, 1815, the appellant executed a trust-disposition, whereby, on the narrative that among other creditors enumerated, he owed Thomas Wright L.6000 sterling, he disponed to John Campbell and such person as Campbell might assume into the trust, whom failing, such person as the creditors might appoint "as trustees for and to the use and "behoof of my whole just and lawful creditors, herein specially "before named, and of any others my just and lawful creditors, "at the date hereof, herein omitted, and whom my said trustee "shall assume into the benefit of this disposition, in virtue of the "powers herein after written, — all and sundry lands, heritages, "rights of annualrent or annuities whatsoever belonging to me; "together with insurance policies, rights of redemption, and all

" debts and sums of money due to me by bonds heritable and " moveable, bills, accounts, decreets, or in any other manner of " way whatsoever; and, in general, my whole means and estate, " of whatever nature or description, either at present belonging, " or that may belong to me during the existence of this trust; " together with the whole vouchers and instructions of such " estate, and all bonds, bills, accounts, decreets, and other " grounds of debt, and all that has followed or is competent to " follow thereupon."—" And likewise with power to the said John " Campbell, *quartus*, or his successors in office, to borrow money " for the purposes of this trust, and to grant bonds, either heri- " table or personal, or other securities, over the lands and others " hereby disponed to the persons who shall lend the money, de- " claring that the lenders shall have no concern with the appli- " cation of the money, nor with the conditions of these presents; " with power also to the said trustee to bind me, my heirs and " successors, in payment of such sums of money as may be so " borrowed in virtue hereof, and of the interests to become due " thereupon, and penalties corresponding thereto; with power " also to the said trustee to insure my life in any of the established " insurance offices, to such extent as he shall be advised to do by " the committee hereafter named, provided they see cause; but " in trust always for the uses, ends, and purposes, and under the " conditions, provisions, and reservations after mentioned, viz., " *Primo*, for payment of the expense attending the execution of " this trust, and the regular payment of the public burdens " affecting, or which shall affect the said lands and others. " *Secundo*, for payment to me during my life of a free yearly " annuity of L.600 sterling, payable at four terms in the year, " Candlemas, Whitsunday, Lammas, and Martinmas, by equal " portions, beginning the first term's payment thereof as at the " term of Lammas last, and yearly thereafter at the terms before " mentioned; and I shall be farther allowed to retain my house-

" hold furniture upon a receipt and obligation to re-deliver the " same, or its estimated value, when required to do so by my " said trustee, reserving any preferences which may be acquired " thereon. *Tertio*, it is hereby provided and declared, that " these presents are granted for and to the special end and effect, " that my said trustee shall from time to time apply the prices " and the whole proceeds of the lands, and others above disponed, " and the debts and other effects generally above conveyed, or " prices thereof, for payment to my creditors above named, or " to those who shall appear to my said trustee to have been law- " ful creditors of me at the date hereof, although not herein " before mentioned, whom my said trustee is authorized to assume " into the benefit of this disposition, and that according to the " extent of their several debts, and to their several rights and " preferences, conform to a scheme of division to be made thereof " among my said creditors, duly authorized by the said trustee " for the time, declaring that this disposition shall not import, " or be construed, or understood to prefer any one creditor to " another, or to postpone or annul the rights and diligences of " any creditor already done or acquired, but that the creditors' " preferences among themselves shall remain unhurt, and not " prejudged, in the same manner as if these presents had never " been granted, reserving all objections to such rights and secu- " rities competent at law, and that without in anywise binding " or affecting the said security; as also it is provided and de- " clared, that although the said trustee, or person who may be " assumed as aforesaid, shall resign, which they are to be at liberty " to do, or shall fail to accept, or shall die before the execution of " this trust-right, yet, nevertheless, the same shall nowise cease " or become void, but the present trust-right and the infeftment " to be taken in virtue hereof, and all that may follow hereon, " shall stand and subsist as a security to my whole just and law- " ful creditors preceding this date, as well those that may be

" herein omitted, as those that are herein stated; and, in the " event of such death or resignation, it shall be competent and " lawful to my said creditors, or major part of them, according " to the extent of their principal sums, and not *per capita*, nor " according to the number of names present at a general meeting " to be called for that purpose, upon advertising in such news- " paper as they shall think fit, during three successive weeks, to " choose, from time to time, such trustee or trustees, for exe- " cuting the trust before mentioned, as they shall think proper; " which trustees, so to be named by my said creditors, shall be " fully invested in the rights of the whole lands, and others " hereby conveyed, and in all the powers hereby committed to " my said trustee before named, as if they had been expressly " named and appointed trustees by these presents, or as the said " trustee herein named, might or could have done, had he exe- " cuted the trust herein committed to him: Lastly, It is hereby " expressly understood and conditioned, that after payment of " the debts due by me as said is, or such thereof as shall require " payment, my said trustees shall make payment to me, my " heirs or assignees, of the residue of the money, or other move- " able property in their hands, falling under, or arising out of " this trust, if any shall remain, and shall, when the said debts " are so paid off, convey and re-dispone to me and my foresaids, " the whole of my said lands and estate, and other property " hereby conveyed, in so far as the same shall not have been " disposed of, with warrandice from fact and deed only; declar- " ing, however, as it is hereby expressly provided and declared, " that the said trust, and whole powers vested in the said trustee, " shall subsist and continue in full force, aye and until the said " trustee shall be relieved of all advances of money, and other " obligations that he may have come under on my account, in " the execution and management hereof under these presents: " And the said trustee shall be entitled to hold the subjects

" hereby disponed and made over, till he is relieved thereof, " with and under the burden of which provisions and conditions " these presents are granted, and no otherwise."

On the 28th November, 1815, Thomas Wright, among others, subscribed a deed of accession to the trust-disposition, which, after narrating the latter deed, proceeded in these terms: — " And considering that we, the said creditors, are satisfied that " the foresaid disposition and trust-right is the most speedy and " least expensive method of making effectual the funds for pay- " ment, and for dividing and paying the same to us, do there- " fore accede and agree to, ratify and approve of the foresaid " trust-right and disposition granted by the said James Hamilton, " and whole powers thereby committed to the said trustees, in " the whole articles, heads, and clauses, therein contained, and " consent that the same take effect to all intents and purposes: " And hereby bind and oblige us, and those who may hereafter " have right to our respective debts, to conform thereto, and to " the proceedings to be had in pursuance thereof, in every " respect, as we are severally concerned: And farther, we do " hereby agree, covenant, and oblige ourselves, and those for " whom we act respectively, that we, or our constituents, shall " not raise, commence, or follow forth any action, suit, diligence, " or execution for arresting, attaching, or seizing the person of " the said James Hamilton, or the estate, subject, sums, debts, " and effects belonging to him, during the subsistence of this " trust."

Mr Campbell was infeft and entered into possession under the trust-disposition of the property thereby conveyed, and an arrangement was made whereby the appellant was made agent of the trust, in which character considerable sums were incurred to him.

On the 10th day of December, 1817, the appellant joined the Honourable Thomas Bowes (afterwards Earl of Strathmore) and

Buchan in granting a redeemable bond to Telford for payment of an annuity of L.221, 13s. 4d. during the life of Bowes, in consideration of L.2000 paid to Bowes.

On the 23d January, 1818, upon the resignation of Campbell as trustee under the disposition of 1815, the creditors appointed Thomas Wright to be trustee in his room, and he accepted of the office, and was infeft under the disposition.

On the 22d May, 1822, Thomas Wright took from Telford an assignation to the bond of annuity by Bowes, Buchan, and the appellant, giving as the consideration L.2000, the original price of the annuity.

In May, 1824, Thomas Wright died, leaving a trust-disposition of his whole means and estate in favour of the respondents as his trustees and executors.

In the year 1832, the respondents gave the appellant a charge of horning for payment of the whole annuities under the bond of 1817, with interest on each annuity from the time it became due, and for payment of the annuities to become due during the life of Bowes. At the date of this charge, the trusts of the disposition of 1815 were still unexecuted, but from the time of Wright's death, no step whatever had been taken to appoint a successor to him as trustee.

The appellant brought a suspension of the charge upon the annuity bond, and at the same time he brought an action to set aside the bond as void, under the act 1681. The respondents, on the other hand, with the view of obviating the effect of the suspension, so far as regarded certain defects in the bond, which might have founded a good objection to summary diligence proceeding upon it, brought an ordinary action for payment.

The appellant failed in the reduction, and the case then came on for decision in the suspension and the ordinary action, which had been conjoined. The appellant alleged that he had never received payment of his annuity under the trust-deed, and that

the creditors under it had not been paid their debts, and urged several pleas in support of his suspension, and in defence to the ordinary action; but in the view which ultimately came to be taken of the case, the only plea which it is necessary to notice was the fifth, which was in these terms: —

" V. The said Thomas Wright, as trustee for the suspender, " could only acquire any debt against the suspender, or his " estate, for behoof of the suspender, and in particular, of that " trust over which he presided as trustee; and he was barred, by " his character of trustee, and by having signed the deed of " accession, from making such a debt a ground of proceeding " against the person or estate of the suspender."

The respondents, on the other hand, professed ignorance as to the state of the payments to the appellant, but did not deny that the trust had not been wound up, and pleaded, in answer to the plea stated by the appellant, —

" A trustee, acting under a trust-deed, for behoof of creditors, " is not barred from acquiring and holding debts and obligations, " which do not compete against, or interfere with, the interest of " the creditors for whom he is trustee."

On the 30th November, 1838, the Lord Ordinary (Cockburn) pronounced the following interlocutor, adding a note, which is subjoined so far as relates to the matter decided on the appeal: — " The Lord Ordinary, having heard the counsel for the parties " on these conjoined processes of ordinary action, reduction, and " suspension, Finds, That the late Thomas Wright, when he " acquired the bond in favour of the late John Telford, which is " the ground of the present charge and ordinary action at the " instance of his (Wright's) trustees, was the trustee of James " Hamilton, one of the debtors in the bond, who now suspends " a charge, and defends an ordinary action thereon: Finds, " That Wright, being trustee for Hamilton, could not compe- " tently acquire the bond for his own benefit: Finds, That the

" suspender offers to repay or to allow credit for the price paid " by Wright for the assignation to the bond, and the interest, if " any, legally exigible under it: Finds, That, on being thus " settled with, the said Thomas Wright was, and that his trustees " now are, bound to communicate any advantage that may have " accrued, or may yet accrue from this transaction to the trust- " estate of the said James Hamilton, and that they cannot sue a " charge upon the bond so acquired for their own behoof: Finds, " That the said James Hamilton is not bound by judgment " hitherto pronounced in any of these processes from maintaining " this plea: Therefore, but under reservation of the chargers " being settled with as above, and of their right to institute any " competent proceeding that may be necessary for enforcing or " securing this right, sustains the above defence against the " ordinary action at the instance of Wright's trustees, and the " above reason of suspension of their charge, and decerns, " reserving consideration of all other points in the cause, " expenses included, until this interlocutor shall become final, or " shall be altered."

" *Note.* — The Lord Ordinary is of opinion, that since Mr Hamilton " offers to account for the price paid for the assignation, and claims " the benefit of it, he is entitled to be settled with on this footing; " and that the chargers cannot insist on securing the benefit of the " transaction for their constituent's estate.

" Mr Wright was not under any legal disqualification from acquir- " ing; but, being trustee for the suspender, and bound as such to " enlarge his and the creditor's funds, he could only acquire for behoof " of the trust-estate. This is the general principle of the law of " Scotland, not merely in the case of direct trustees, but of guardians, " executors, &c. and of all those who are in the situation of being " trusted for behoof of another, and it is a principle which the security " of trustees requires to be strictly enforced. It may not be the duty " of a trustee to purchase or compound debts due by the truster;

" but, if he shall do so, and yet be allowed to appropriate the benefit " to himself, it is impossible not to see the power which this gives " him, and the danger to which the estate is exposed, especially con- " sidering the superior knowledge of the affairs which this office " implies. The chargers argue that this is *jus tertii* to the truster; " and that, provided the creditors are not hurt, he cannot object. " But the trustee is bound to promote the interest of the truster as " well as of the creditors. Mr Wright's duties were not at an end as " soon as he had seen the creditors paid. He was bound to make " over the largest possible reversion to Mr Hamilton; but instead of " doing so, he claims it wholly or partly to himself, as the benefit " arising from a voluntary and unauthorized purchase of a debt due " by the estate. The law presumes, that all the transactions of a " trustee in relation to the trust, are made for behoof of the estate; " and whatever may be the case where benefit arises to a trustee in- " voluntarily, as by succession to a debt, or otherwise, the law requires " every trustee to purify himself by communicating any advantages " for which he transacts, or which accrues from his transactions, to " his constituents.

" The more common case to which this rule is required to be " applied, is the case of a trustee taking advantage of his position to " deal directly with a party to the trust, whether truster or creditor, " and to make a direct acquisition of part of the trust-funds. The " case which has now occurred of his purchasing a claim by a stranger " against the estate, is more rare. But the Lord Ordinary can dis- " cover no ground for hesitation as to extending the principle to this " last case. For the dangers of exposing trust-estates to such opera- " tions by trustees for their own behoof, are the same; and the trustee " who acquires right to lessen the reversion, by taking benefit out of " it for himself, does in reality appropriate the trust-fund. Accord- " ingly, the principle that the trustee shall communicate all such " advantages, has been often acted upon. It is laid down expressly " by Erskine in reference to guardians, (i. 7, 19,) and, besides, the " cases of Maxwell, (15th November, 1667, Dict. 16166,) and of Rae, " (21st February, 1673, Dict. p. 16170,) which were referred to at " the debate, the more recent ones of Wright, (24th June, 1712, Dict.

" 16193) and of Crawford (6th March, 1767, Dict. 16208) all proceed " upon this rule."

The respondents reclaimed against this interlocutor, and on the 26th of February, 1839, the First Division of the Court pronounced this interlocutor: — " The Lords having considered " this reclaiming note, and heard counsel for the parties, recal " the interlocutor reclaimed against, repel the fifth plea in law, " and *quoad ultra*, remit to the Lord Ordinary, all questions of " expenses being reserved."

On the cause returning to the Lord Ordinary, he, on the 5th June, 1839, pronounced this interlocutor: — " The Lord Ordi- " nary having heard counsel for the parties, and considered the " conjoined processes, in the suspension repels the reasons of " suspension, finds the letters orderly proceeded, and decerns: " In the ordinary action repels the defences, and decerns in " terms of the libel, finds the chargers and pursuers entitled to " expenses, appoints an account thereof to be given in, and when " lodged remits the same to the auditor to tax and to report."

The appellant then reclaimed, and on the 28th November, 1839, the Court pronounced this interlocutor: — " The Lords " having advised the reclaiming note, and heard counsel for the " parties, adhere to the interlocutor reclaimed against, and refuse " the desire of the note: Find additional expenses due, appoint " an account thereof to be given in, and when lodged remit the " same to the auditor to tax and to report."

The appeal was against the interlocutors of the 26th February, 5th June, and 28th November, 1839.

Mr Pemberton and Mr Anderson for the appellant. — The trust under the deed of 1815 was for the appellant, in preference to his creditors, to pay him the annuity of L.600, before the

creditors received any thing, so that he has a material interest, independent of his right to any surplus, to control the actings of the trustee. By the law of Scotland, equally with the law of England, a trustee cannot deal with the trust-estate for his individual benefit; he may purchase, no doubt, but the purchase will enure to the *cestui que* trust. *Ersk.* I. 7. 19; Maxwell, *Mor.* 16166; Rae, *Mor.* 16170; Wright, *Mor.* 16193; Crawford, *Mor.* 16208; York Buildings Company *v.* M'Kenzie, *Mor.* 16212; Wilson, *Mor.* 16376; Jeffrey *v.* Aiken, 4 *S.* and *D.* 722. The purchase, therefore, of the bond of annuity by Wright was for the benefit of the appellant and his creditors, and all that the respondents can be entitled to is the price which he paid, with interest.

Mr Stuart and Mr Gordon for respondents. — The bond of annuity was not in existence at the date of the trust-deed, and as the trust was for the benefit of those only who were creditors at its date, the annuity was wholly without the scope of the trust. The obligation, therefore, in the deed of accession, not to do diligence, could have no effect upon the bond of annuity, which had not then any existence, and at its date formed the creation of an entirely new debt. No doubt a trustee cannot deal so as to prejudice the rights of his *cestui que* trusts; he cannot as trustee sell, and as an individual become purchaser, because his duty as vendor is opposed to his interest as purchaser; but nothing of the kind happened here, and it is difficult to see how the rights of the creditors were in any way affected by the purchase. The annuity not being claimable under the trust-deed, the trust-estate was no way concerned in the price which might be paid for it.

But the doctrine in regard to the dealing of trustees with the trust-estate is open to many qualifications. If the transaction be open and fair, and known to the *cestui que* trust, and he lie

by and allow it to be completed, he will not be allowed to challenge it at a subsequent stage, Gregory *v.* Gregory, *Jac.* 631. Randall *v.* Errington, 10 *Ves.* 422. The purchase, in this case, was quite open and known to Hamilton, and was far from being a very advantageous one for the purchaser. The price he paid in 1822 was the same as had been given in 1817, although the annuity had decreased in value by the time which had elapsed between these two periods.

[*Lord Chancellor.* — Wright, while trustee, purchased a claim against the trust-estate, which has turned out an advantageous purchase, and the question is, whether he shall have that advantage or the estate?]

The claim was not against the estate, but against Hamilton personally, and by the purchase of it Wright could not in any way prejudice the creditors. Accordingly, no creditor complains; but Bowes, on whose life the annuity was payable, having lived longer than was expected, the transaction turns out profitable, and in 1831, Hamilton, seeing this, wishes to redeem on the same terms on which he might have done this in 1822. Can that be permitted?

[*Lord Brougham.* — Could you have sued upon the bond in 1822?]

Unquestionably, and so also could Hamilton have then resisted payment.

[*Lord Chancellor.* — Did not the bond put you in competition with the creditors? You had a power to borrow money, and make Hamilton liable, or the estates. If the trustee had exercised this power, would he not have come in competition with the creditors?

Lord Campbell. — Then Hamilton would be less able to pay your bond.

Lord Chancellor. — The trustee was interested not to exercise the power in the deed, because it would raise up the creditors in competition with him.

Lord Brougham. — He has created that interest during the subsistence of the trust.]

There is no case which has pushed the doctrine so far as to make such an interest objectionable, but, at all events, that would be a question proper for the creditors to try; but no creditor complains, and even as between them no case has carried the doctrine so far as is suggested by the question. The trustee was not necessarily in conflict with the creditors, his interest lay with theirs, to clear the surplus, and make it available for his purchase. The only object of the deed of accession was to bind the parties not to impeach the trust-deed, and the mode of arrangement contemplated by it; but this could only be as to claims which had existence at that time.

[*Lord Chancellor.* — Suppose Wright had lent Hamilton L.1000 after the date of the trust-deed, could he have sued for it? Try it that way.]

We apprehend he could. There was nothing in the trust-deed, or deed of accession, to tie up the hands of the parties from all farther transaction. Hamilton, on the contrary, was to carry on his practice, and eventually he became agent under the trust. His annuity under the trust, and the profits of his practice, was estate, which it was perfectly competent for him to bind and transact in regard to.

Mr Pemberton, in reply. — The duty of Wright, under the trust, was to realize the whole estate, or whatever he could acquire; his interest, under the purchase, was to abstract what he had so realized, for his own payment. His interest was thus in direct competition with his duty. He had opportunities of knowing the appellant's means, and of taking advantage of his necessities, which, if he had not been trustee, he would not have possessed. Under the trust he was trustee to pay the appellant the annuity of L.600, preferably to any of the creditors, but the claim under the annuity bond was not subject to any postponement; it was no way affected by the terms of the trust. The

purchase of the annuity, therefore, was to give the trustee an interest not to perform his trust, but to abstract the fund for his own payment, and in preference over all the *cestui que* trusts, and thus to deprive him of that unbiassed independent situation in which alone the law can contemplate an impartial and faithful exercise of his duty. Moreover, the purchase subverted the whole plan of arrangement with the creditors, for under the terms of the trust-deed, no property could be acquired by the appellant which would not have been applicable to the trusts of that deed.

[*Lord Chancellor.* — The effect of your argument is, that no creditor could give him pecuniary assistance.]

Not on any security until payment of the previous debts. The creditors had stipulated, that nothing should be done to interfere with the trust.

LORD BROUGHAM. — My Lords, the appellant, in the year 1815, executed a general trust-disposition of all his estate for the benefit of his creditors. In 1818, Thomas Wright became a trustee under that deed by a clause of devolution, and, in the intermediate time, viz. in 1817, the appellant had become surety, or cautioner, for Mr Bowes, now Earl of Strathmore, in a bond for the payment of an annuity during his life, for L.221, 13s. 4d, the price of which was L.2000, advanced by Thomas Telford to Mr Bowes.

The trustee, Thomas Wright, in 1822, obtained an assignment of this bond for a valuable consideration, and the main question, indeed the only question, and upon which the whole case now turns, is the right which he, as trustee, had to purchase for his own benefit this annuity payable by the appellant. The respondents, as representing Thomas Wright deceased, whose trustees they were, having in vain attempted to obtain payment from the principal debtor, Lord Strathmore, gave a charge against the appellant, of which he brought a suspension. An

ordinary action was then brought against him by the respondents for constitution of the debt, and payment of the arrears of the annuity, to which he urged, in defence, the same matters which formed the ground of his suspension. He also sought to set the bond aside in an action of reduction, but chiefly on the ground of an informality in the execution and testing clause. In this he failed, both below, and when the matter was brought by appeal before your Lordships. But the other question between the parties cannot be considered as concluded by that decision and its affirmance here. For the interlocutor which repelled the reasons of reduction, and assoilzied the defenders, (the present respondents,) also contained an order to hear counsel farther on the suspension and ordinary action, all the three suits having been conjoined. The appellant, therefore, had never been heard, and the Court, whether below or here, had never decided upon any thing but the informal execution of the bond, and no defence of *res judicata* can be allowed to bar his claim upon the other ground.*

In the suspension and action, the Lord Ordinary having decided, that the trustee, Thomas Wright, could not purchase the annuity for his own benefit, with other consequential findings, amounting in substance to giving the appellant the benefit of the purchase upon paying the price given by Thomas Wright, with interest, the Lords of the First Division altered this interlocutor so far as to repel the appellant's fifth plea in law, that is, to find that Thomas Wright had validly purchased the annuity; and they remitted to the Lord Ordinary to proceed farther, who therefore, and on the foot of that finding as to the fifth plea, pronounced the consequential interlocutor appealed from, which was adhered to by the Lords of the First Division: their Lordships having previously refused leave to appeal from their interlocutor, altering the Lord Ordinary's former interlocutor.

* This point was not argued at the Bar.

Thus the question turns upon the trustee's right to purchase the annuity, and that depends upon the nature of the trust.

Now the uses declared in the trust-deed were these: — *First*, To pay the expenses attending the trust, and the burdens affecting the real estate. *Secondly*, To pay the appellant an alimentary annuity of L.600, by four quarterly payments. *Thirdly*, To pay the appellant's debts equally according to their nature and preferences. *Lastly*, To pay over the surplus to the appellant, for whose reversion he was thus a trustee, as much as for his annuity, and as much as for the creditors. It may be added, that before Thomas Wright became trustee, an arrangement had been made, by which the appellant was employed to manage the law business of the trust. Consequently his claim for his expenses, as such, became the very first of all the debts to be discharged by the trustees.

It is material to add, that the deed contains a clause expressly empowering the trustee not only to sell and burden the whole estate, and to sue and compound debts, but to bind the appellant, his heirs and successors, in payment of such sums as may be borrowed, and of the interest that may become due therefrom, and the penalties for non-payment of the same.

Thomas Wright, who afterwards became trustee, and who was a principal creditor, joined in executing a deed of accession to the trust-deed, and bound himself, with the others, not to commence any suit, or sue out any execution against either the person or estate of the appellant, during the subsistence of the trust. When he afterwards accepted the trust, it became his duty, as trustee, to do nothing for the impairing or destruction of the trust, nor to place himself in a position which put his interest in conflict with the interests of the trust.

It seems quite impossible to deny, that when he took an assignment to the annuity, that is, to a bond in which the appellant was an obligor, his interest as assignee became opposed

to the interests of the *cestui que* trusts. The appellant was one of these *cestui que* trusts; he was even the first named. His annuity was preferable to the claim of any creditor. But it was not preferable to the debt which the trustee purchased by the assignment.

In another respect, and still more materially for the present purpose, the appellant was a *cestui que* trust. Thomas Wright was trustee for him of the reversion. It was therefore his duty to make that as large as possible after payment of the creditors. The purchase has been contended to give the trustee an interest in lessening this reversion, and the Lord Ordinary takes this view of it. But one interest it clearly gives the trustee, and an interest in direct conflict with that of the creditors. He had a power to bind the appellant personally and heritably, for the benefit of the trust. But the annuity bond which he purchased made it his interest not to bind the appellant in any way that could give a preference over his obligation in that bond, and give any other person a priority over himself, as purchaser of the annuity bond. The annuity was a debt contracted after the trust-deed, and in respect of which there was a covenant not to sue or to take execution against both person and estate. Surely it cannot be doubted, that a creditor, thus unfettered by the provisions of the deed, and enabled, in a great measure, to defeat its objects, stands in a position adverse to the creditors under the deed. But if so, the trustee under the deed had no right to place himself in that position, and could not do so for his own behoof.

There cannot be a greater mistake than to suppose, as seems to have been done below, that a trustee is only prevented from doing things which bring an actual loss upon the estate under his administration. It is quite enough that the thing which he does has a tendency to injure the trust, a tendency to interfere with his duty. The trustee cannot purchase the trust-estate, though at a sale, without leave of the Court, and yet he might, pro-

bably would, if at an auction, give as good a price as any one else. So he cannot purchase outstanding debts. Glen v. Pearson, *Fac. Coll.* March 6, 1817.

Then if it be said that the creditors are not actually injured, or that the fund, either to pay them, or to hand over by way of reversion to the maker of the trust-deed, cannot be lessened by such purchases, inasmuch as the debts must be satisfied whether payment is made to the original creditor, or to the trustee who takes an assignment, the answer is, that he shall not avail himself of rights so purchased by him, although these rights might have come in competition with the trust had he not purchased. And so it has been decided, Wright, *Mor.* 16193; Anderson, 1740, Nov. 21, *Elchies.*

Nor is it only on account of the conflict between his interest and his duty to the trust that such transactions are forbidden. The knowledge which he acquires as trustee is of itself a sufficient ground of disqualification, and of requiring that such knowledge be not only not used to the detriment of the trust, but be not used for his own benefit, because it may, by possibility, injure the trust, rather than because it may give him an undue advantage over others.

In *ex parte* Lacey, 6 *Ves.* 625, and *ex parte* Jones, 8 *Ves.* 328, Lord Eldon denied the doctrine supposed to have been delivered by Lord Loughborough in Whichcote v. Lawrence, 3 *Ves.* 740, that a trustee must make some advantage of his purchase before it can be set aside; because, in ninety-nine cases out of every hundred, he held that it might be impossible for the Court to examine into this matter. So the conduct of the trustee not being blameable in the purchase, is nothing to the purpose; for the Court must act, his Lordship said, upon the general principle, and unless the policy of the law make it impossible for the trustees to do any thing for their own benefit, it is impossible for the Court to see in what cases the transaction is morally right, and in what cases it is not.

The ordinary case has been, where the question arose upon a purchase of debts owing at the time of the trust being created. But the purchase of a debt subsequently incurred, if that be relied on as taking the present case out of the general rule, gives the trustee, whose duty it is to keep the residue as large as possible for the debtor, an interest in cutting it down, at least, by the amount of his own debt. It also gives him an interest in keeping as large a fund as possible free from the operation of debts prior to his own, in order that his own may be the more surely and speedily satisfied, and this is an interest directly in conflict with his duty under the trust to the prior creditors.

The interlocutors appealed from must be reversed so far as to restore the interlocutor of the Lord Ordinary, first altered by the Lords of the First Division; and it will not be necessary to reverse or to affirm the interlocutor of the 5th March, 1833, and 24th May, 1839, the first and third appealed from.

Lord Campbell. — My Lords, it is quite enough for me to say, that I entirely concur in the view taken of this subject by my noble and learned friend. It is quite clear, that Thomas Wright, as trustee, could not purchase this bond for his own benefit, and that his representatives could not sue upon it for the benefit of his estate; and that the obligor, the present appellant, having offered to pay, or having paid back all that was paid by Thomas Wright, the purchase money, with interest, the respondents have no farther claim.

Lord Brougham. — My noble and learned friend, the Lord Chancellor, who is not now present, who heard this cause with my noble and learned friend and myself, has no doubt whatever upon the question, and authorized me, this morning, to state as much to your Lordships. There having been no difference of opinion on the part of the Judges of the Inner House, with respect to the judgment, we thought, that before reversing this judgment, we should take time fully to consider it.

Mr Anderson. — Will your Lordships permit me to direct

your attention to the terms of the remit? Lord Cockburn reserved the question of costs by his interlocutor. The remit ought to embrace the costs incurred subsequently to the Lord Ordinary's interlocutor.

Lord Brougham. — Certainly, that must be taken into consideration; but we do not alter the interlocutors, the first and third appealed from. It is quite unnecessary to alter those. For instance, it would be absurd to alter the interlocutor refusing leave to appeal.

Mr Gordon. — May I be permitted to bring under your Lordships' consideration that there were certain points discussed after that fifth plea was repelled by the interlocutor of the Inner House, which is now reversed. No opinion appears to have been given by your Lordships upon those points.

Lord Brougham. — No, certainly not.

Mr Gordon. — Then it will be understood, in reversing the interlocutors which repel the fifth plea in law, your Lordships pronounce no opinion upon those points?

Lord Brougham. — It is to be understood exactly as I have stated, that the interlocutors, with the exceptions I have mentioned, are all reversed.

Ordered and Adjudged, That the interlocutors of the Lords of Session of the First Division, of the 26th of February, and 24th of May, 1839, the said interlocutor of the Lord Ordinary of the 5th of June, 1839, and the said interlocutor of the said Lords of Session of the 28th of November, 1839, complained of in the appeal, be reversed, in so far as the same are inconsistent with, or in any way repugnant to, the interlocutor of the Lord (Cockburn) Ordinary, of date the 30th of November, 1838, recited in the appeal: And it is farther Ordered, That the cause be remitted back to the Court of Session in Scotland, with instructions to adhere to the said interlocutor of the Lord (Cockburn) Ordinary, of date the 30th of November, 1838; and to

The ordinary case has been, where the question arose upon a purchase of debts owing at the time of the trust being created. But the purchase of a debt subsequently incurred, if that be relied on as taking the present case out of the general rule, gives the trustee, whose duty it is to keep the residue as large as possible for the debtor, an interest in cutting it down, at least, by the amount of his own debt. It also gives him an interest in keeping as large a fund as possible free from the operation of debts prior to his own, in order that his own may be the more surely and speedily satisfied, and this is an interest directly in conflict with his duty under the trust to the prior creditors.

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" disapprove, that the disapprovers give in their reasons, to the " effect the affair may be cognosced upon by the Presbytery of " the bounds, at whose judgment, and by whose determination, " the calling and entry of a particular minister is to be ordered " and concluded: And it is hereby enacted, that if application " be not made by the eldership and heretors of the paroch to the " Presbytery for the call and choice of a minister within the " space of six months after the vacancy, that then the Presbytery " may proceed to provide the said paroch, and plant a minister " in the church *tanquam jure devoluto.* And in lieu and recom- " pense of the said right of presentation, hereby taken away, " their Majesties, with advice and consent foresaid, statute and " ordain the heretors and liferenters of each paroch, and the " town-councils for the burgh, to pay to the said patrons, betwixt " and Martinmas next, the sum of six hundred merks, propor- " tionally effeiring to their valued rents in the said paroch, viz. " two parts by the heretors, and a third part by the liferenters, " deducing always the patron's own part effeiring to his propor- " tion as an heretor, and that upon the said patron his granting " a sufficient and formal renunciation of the said right of pre- " sentation in favours of the saids heretors, town-council for the " burgh, and kirk-session: And it is hereby declared, that as to " the paroches to which their Majesties have right to present, " upon payment of the said six hundred merks to the clerk of " the Theasaury, their Majesties shall be fully denuded of their " right of presentation as to that paroch; and as to other patrons, " if they refuse to accept the said six hundred merks, the " same is to be consigned in the hands of a responsal person in " the paroch, upon the hazard of the consigners, not to be given " up to the patron, until he grant the said renunciation; allowing, " in the meantime, the heretors and kirk-session to call the " minister, conform to this act: And ordains letters of horning " to be direct at the instance of the patron against the heretors

" and others, who shall not make payment of the said six " hundred merks, after the said term of Martinmas next, and " likeways at the instance of the heretors and others willing to " pay, against these who are unwilling; and in case the patron " be unwilling to accept the said sum, or the heretors and others " aforesaid unwilling to pay, ordains letters of horning to be " direct at the instance of their Majesties' solicitor against either " of them."

On the 17th May, 1696, the heritors and liferenters of the parish of Cadder paid to the University of Glasgow 600 merks for the purchase of the patronage of the parish, under the terms of the act. No vacancy, however, occurred in the benefice until the year 1731.

In 1712, the 10th of Anne, cap. 12, upon a recital of the inconveniences of the mode of presentation established by the act 1690, and that it had likewise " been a great hardship upon " the patrons whose predecessors had founded and endowed " those churches, and who have not received payment and " satisfaction for their right of patronage from the aforesaid " heritors or liferenters of the respective parishes, nor have " granted renunciations of their said rights on that account," repealed the act 1690, and declared that the right of patronage should be exercised as it had been prior to the passing of that act, " provided always, that in case any patron or patrons have " accepted of and received any sum or sums of money from the " heritors or liferenters of any parish, or from the magistrates " and town-council of any burgh, in satisfaction of their right of " presentation, and have discharged or renounced the same under " their hand, that nothing herein shall be construed to restore " such patron or patrons to their right of presentation, any thing " in this present act to the contrary notwithstanding."

On the 30th of December, 1725, the Principal and Professors of the University executed a deed, which, after reciting the pro-

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On the 30th of December, 1725, the Principal and Professors of the University executed a deed, which, after reciting the pro-

visions of the act 1690, continued thus: — "Lykeas the said "university being patron of the paroche of Calder, the heritors "and liferenters of the said paroche did some time ago, and "before the British act of Parliament restoring patronages, make "payment to the Principall and Professors of the said university "for the time, of the foresaid soume of 600 merks money, as "appears by the books and accompts of the university, for the "years 1695 and 1696, for granting the right underwritten, "which we are now willing to do: Therefore witt ye us, the said "Principall and Professors of the said university, patron of the "said paroch of Calder, with consent foresaid, to have renounced, "transferred, disponed and overgiven, as we do hereby, with "and under the reservation underwritten, renounce, transfer, "dispone, and overgive, to and in favours of Robert Lord "Blantyre," [here followed a great variety of names,] "and "other heritors of the said paroch of Calder, if any be, conform "to their respective interests and heritadges y^r^in, and their suc- "cessors whatsoever in the saids lands; and the kirk-session of "the said paroch, now, and in all time coming, the foresaid "right of presentation of a minister to the said paroch of "Calder, with power to them, upon the first vacancy of the said "paroch, and in all time y^r^after, to present ministers thereto, "and to do every other thing y^r^anent, as fully and amply in all "respects, as the said university could have done, of before, or "in time coming, if these presents had not been granted. "Whereat wee oblidge us and our successors to abide firm and "stable, but reclamation, and to warrand this right from the "facts and deeds of us and our successors only, done, or to be "done in prejudice hereof: Reserving alwise to us, notwith- "standing hereof, all right and title that formerly belonged to "us as patron, except the right of presentation of a minister to "the said paroch allenarly."

The deed of 1725 fell aside, and was not discovered until the

year 1793; from that period there had occurred only one or two vacancies in the benefice prior to the proceedings to be presently detailed.

The practice of the parish in regard to the exercise of the right of patronage vested in it by the deed of 1725, was not precisely admitted, but was said to have been to hold a meeting of the heritors and kirk-session, at which the votes were taken for the respective candidates, and afterwards to have a formal deed of presentation prepared and sent round for execution. This deed was then presented to the Presbytery, who thereupon moderated in the call. Whether the votes at the meeting, or the signatures to the deed, had been held to express the approval or disapproval of the congregation required by the act 1690 — and whether the deed was in use to be taken round to the whole heritors and liferenters, or only to a limited number — and if so, to what number — did not appear.

In the year 1834, the General Assembly separated Chryston, a part of the parish of Cadder, from the rest of the parish, and erected it *quoad sacra* into a separate parish; the churches of the two parishes being seven miles distant from each other.

Early in the year 1836, Lockerby, the minister of Cadder, agreed to resign his charge, and that steps should be taken to appoint an assistant and successor to him. Various preparatory meetings of the heritors and kirk-session were held with this view. At a general meeting on the 17th March, 1836, it was resolved that all parties claiming to vote should be required by advertisement to lodge their claims and titles in the hands of the clerk to the heritors; this was accordingly done, and thirty-five persons complied with the advertisement. At another general meeting held on the 19th May, 1836, it was resolved, "that this "meeting proceed to elect an assistant and successor to Mr "Lockerby on the 4th of August next, being the first Thursday "of that month, and that three weeks previous notice be given

" to all the patrons by edictal intimation;" and " that while the " meeting do not consider themselves at all entitled to compro- " mise the right of any patron, absent or present, to vote for " whom he pleases on the day of election," they recommended the names of seven persons as candidates. Leave was accordingly asked and obtained from the Presbytery of the church that these persons should preach in the parish church on successive Sundays. The respondent Park was one of the seven, while the appellant Young, who was, and had for some time been, minister of the adjoining parish of Chryston, was not of the number; this, Young said, arose from the circumstance that his ministry was known to, and accessible to, the parishioners.

The meeting on the 4th of August was accordingly held. The title of the minutes of the meeting bore that it had been called " for the purpose of electing an assistant and successor to the " Reverend Thomas Lockerby." After enumerating the persons present, the minutes bore, that a motion was made for the appointment of a preses and clerk, and that " before the motion " was put, William Brown protested for himself, his mandants, " and all who should adhere to him, that the entry of names in " the sederunt, and the reception of votes at this meeting, should " not infer any recognition of the title of such parties to vote in " the election."

After the names of the persons present had been read, Mr Brown again protested in these terms: — " I protest that feuars " not subject to, and not paying any of the public or parish bur- " dens, have no right to vote at the present meeting; that lease- " holders and trustees for others have no right; that liferenters " and fiars have no right to vote on the same subject; that per- " sons claiming the character of elders are not entitled to be " enrolled or to vote, unless those who have been duly admitted, " and who continue to act as elders of the proper kirk-session of " Cadder parish, and whose admission is recorded in the books

" of the kirk-session, and of which record evidence is produced; " that no elder is entitled to vote by proxy; and that no man- " datary of such elder can vote legally, — and that any vote " given by him is null and void; that no heritor whose title is " not feudally completed, or who holds merely a personal right " to vote; and that no heritor is entitled to have more than one " vote; and that all persons entered on the roll who do not pos- " sess the character of heritors or elders of the parish of Cadder, " should be struck off the roll, and should not be allowed to " vote at the present meeting; and that all votes given by any of " these persons comprehended in any of the classes of objections " above set down, should be void and null, and not counted; " and farther, I protest for redress and for remedy at law, on all " and sundry the premises."

" Mr Campbell of Bedlay now moved, that the patrons of the " parish should elect the Rev. Mr John Park, preacher of the " gospel in Glasgow, assistant and successor to the Rev. Mr " Lockerby, which motion was seconded by Mr John Carss.

" The Rev. Mr Bogle now moved that the Rev. James " Young, Master of Arts, minister of Chryston chapel, should " be so elected assistant and successor, and the motion was " seconded by the Rev. James Graham Campbell."

The minutes then bore that the appellant, Young, and the respondent, Park, were severally proposed as candidates, no others appearing, and that the votes having been taken and counted, there were *fifty-four* for Young, and *fifty* for Park. The minutes continued in these terms: —

" Hereupon Mr Brown protested for his constituents, and " those who might adhere to him, that on the vote being " declared, after deduction of the false, fictitious, and incompe- " tent votes given for Mr Young, he was in a great minority, and " that Mr Park was duly elected by a majority of the true and " qualified patrons of the parish, and protested for redress and

" remedy at law, and took instruments in the clerk's hands; and " farther, protested against the validity of the whole votes given " for the said Rev. Mr Young, and again took instruments in " the clerk's hands.

" Thereafter, Mr Macdonald, on behalf of his constituents, " and all who should adhere to them, protested against all and " sundry votes given for Mr Park, and for a scrutiny of the " votes, and protested that Mr Young is duly elected by a legal " majority of votes, and took instruments in the clerk's hands. " The voters for Mr Young nominated and appointed the said " Charles Alexander King, the Reverend John Bogle, the said " James Drew, writer, Glasgow, and the said John Macdonald, " junior, writer, Glasgow, as a committee to carry Mr Young's " election into effect, with power to make and complete the pre- " sentation in his favour, and the requisite application to the " Presbytery therewith, and for his induction; any two of the " said committee to be a quorum."

" On the other hand, the voters for Mr Park appoint Mr " Campbell, Bedlay, Mr Sprot, Garnkirk, Mr Anderson for " Mr Lamont of Robroystone, Mr Thoms for Mr Stirling of " Cadder, Mr Campbell, session-clerk, and Mr Scott of Dry- " field, elder, a committee, with power to carry Mr Park's " election into effect; to procure the presentation in his favour " completed and laid before the Presbytery, and to attend to " Mr Park's induction, any three of the said committee a " quorum, and Mr Campbell convener."

After the meeting Young and Park respectively procured deeds of presentation to be prepared and carried round the parish for signature by the heritors and kirk-session. The deed in favour of Young was subscribed by *fifty-three* persons, by themselves or their agents, and that in favour of Park by *sixty-seven* persons in the same manner; seventeen of the latter persons had not been present at the meeting of 4th August. Neither deed

contained the signatures of a majority of those entitled to present, though the deed in favour of Park bore, that it was executed "by the legal majority of the heritors and members of the kirk-"session;" and both of the deeds together did not include the whole of that body, as many of them neither attended the meeting of the 4th of August, nor signed either of the deeds of presentation.

On the 7th of September, both of the deeds were lodged with the Presbytery of the district, together with an extract of the minutes of the meeting, which was produced by Young. The Presbytery delayed moderating in the call until the 5th of the following October, that the parties might have an opportunity of ascertaining the validity of the deeds in a court of law. No such proceeding having been adopted, the Presbytery, on the 5th of October, sustained the presentation in favour of Park, and moderated in a call to him, which was signed by many of the parishioners, without a dissent tendered, and ultimately the Presbytery ordained him minister of the parish. In the meanwhile Young appealed to the Synod in regard to the sustaining of Park's presentation, and ultimately to the General Assembly, which, on the 30th of May, 1837, affirmed the judgment of the Presbytery.

In the month of February, 1837, while the proceedings in the Church Courts were still in dependence, Cullen, the appellant, and other parties, styling themselves elders and heritors of the parish, brought an action against Sprot and others, which, after setting forth the proceedings which have been detailed, and specifying objections to the votes given for Park, subsumed, "Not-"withstanding of all which the defenders are illegally and un-"warrantably proceeding to carry through the ordination and "induction of the said Reverend John Park as assistant and "successor to the said Reverend Thomas Lockerby, the "minister of the said parish of Cadder, in violation of the said "election, so made by the majority of the said meeting of heri-

" tors and elders, held on the fourth of August last, and of the " corroborative deed of presentation following thereon in favour " of the said Reverend James Young, and of the rights conferred " on him by that election and presentation;" and concluded that it should be declared, " that the right of presentation of a minister " to the said parish of Cadder became vested in the heritors of the " said parish (being Protestants) and the elders, by virtue, and from " and after the passing of said act of the first Parliament of William " and Mary, cap. 23, the heritors and liferenters of the said " parish having paid to the then patrons thereof the statutory " sum of 600 merks Scots, ordained by the said act to be, upon " the granting of a discharge and renunciation, paid to the said " patrons, in lieu and recompense of the right of patronage there- " by taken away, and the heritors of the said parish (being " Protestants) and the elders having, on all occasions, ever since " the passing of the said act, exercised the said right of presen- " tation: That in so far as regarded the election of an assistant " and successor to the said Reverend Thomas Lockerby, present " minister of that parish, the right of presentation was duly and " completely exercised by the votes given at the said meeting of " heritors and elders, held on the 4th day of August last, and " that the pursuers constituted, and were the legal and actual " majority of the individuals entitled to vote, and who voted at " the said meeting;" and that the pursuer, Young, was thereby duly elected assistant and successor to Lockerby; and that the votes given in favour of the defender, Park, by persons enumerated, were null and void, and of no avail, and that the said parties so tendering the said votes had no right or title so to vote in the said election; " That the deed of presentation exe- " cuted in favour of the said Reverend John Park, which bore " no reference to the election, made and completed at the said " meeting of heritors and elders, on the said 4th of August last, " and which was not made at any general meeting of heritors

" and elders, duly authorized, and convened in pursuance of the " said act of Parliament, or duly convened in any manner of " way, was altogether null and void; and in any event, that of " the individuals so subscribing the said deed of presentation in " favour of Mr Park, who were not present at the said election " meeting," certain persons enumerated, " were not *in titulo* " to exercise the right of patronage of the said parish, and " especially after the said election meeting, had no right or title " to vote, or take part, in any manner of way, in the election " and presentation of an assistant and successor to the said " Reverend Thomas Lockerby." And it being found that the pursuer, Young, was duly elected, the Presbytery ought to be ordained, " to receive and sustain the said minutes of election, " and corroborative deed of presentation, as a valid and effectual " election and presentation in favour of the pursuer, the said " Reverend James Young, as assistant and successor duly elected " to the said Reverend Thomas Lockerby, minister of the said " parish of Cadder, reserving to the said Presbytery their right " *quoad ultra* to proceed in the matter in terms of law, and ac- " cording to the rules of the church; or otherwise, and failing " decree in terms of the conclusions herein above written, it " ought and should be found and declared, by decree foresaid, " that the pursuers, heritors and elders aforesaid, and the whole " other heritors and elders of the said parish of Cadder, are en- " titled to hold another meeting, in all due form, according to " law, for the purpose of choosing and electing an assistant and " successor to the said Reverend Thomas Lockerby as minister " of the said parish, and to make and complete an election of " such assistant and successor accordingly."

The pleas in law by the pursuers in support of their action were: —

" 1. The right of patronage or presentation in the parish of " Cadder is to be held a right of patronage or presentation

" acquired by the heritors and elders under the act 1690, cap. 23, " and is so to be regulated and dealt with in the present question.

" 2. According to law and usage the election of a minister " under a right of presentation acquired by virtue of the statue " 1690, is to be made by the majority of voices at a meeting of " heritors and elders duly called, and in the present case, the " election is to be determined according to the majority of voices " at the meeting of 4th August 1836.

" 3. The pursuer Mr Young, having the majority of legal " and valid votes at that meeting, is the duly presented assistant " and successor to the parish of Cadder; and the defender Mr " Park, having the minority of legal and valid votes at this " meeting, has no legal title to the office.

" 4. The defender Mr Park is not entitled to found on the " deed of presentation got up on his behalf subsequently to the " meeting of 4th August, as varying or controlling the election " at that meeting. At any rate, even that presentation itsel " does not afford him sufficient grounds for claiming a majority " of legal votes.

" 5. The proceedings in the church courts taken on behalf of " the defender Mr Park, and in opposition to the distinctly " intimated claim of the pursuer Mr Young, cannot affect the " pursuer's rights, at all events, cannot affect his civil rights to " the benefice.

" 6. There is no good ground for impugning the right of " the pursuer Mr Young on the ground of any want of qualifica- " tion to government on the part of those presenting or vot- " ing for him. In any event, this is a plea which it is *jus tertii* " to the defenders to state, as, if well founded, it would not ope- " rate to confirm their own presentation, but to create a right in " the Crown.

" 7. In any event whatever, the presentation to Mr Park " could not be sustained, not being subscribed by an actual

"majority of the whole persons within the parish entitled to join "in the presentation, and the pursuers would be entitled to have "another meeting appointed for election, or other means taken "for ascertaining the sense of the true majority; and at all "events, in the meanwhile, are entitled to object to the presenta- "tion, as not being a presentation by a legal quorum of the "patrons."

On the other hand, the pleas in law for the defenders were:— "1. Assuming that the right of the heritors and elders of the "parish is to be held as acquired under, and to be regulated by, "the act 1690, cap. 23, and that the election is to be determined "according to the number of legal and qualified votes given at "the meeting of 4th August, 1836, the defender, Mr Park, "having been validly voted for by a great majority of those "legally entitled and qualified to vote thereat, is the lawfully "elected assistant and successor to the parish of Cadder, while "Mr Young, not having been validly voted for by a majority of "those entitled and qualified to vote, has no title to the office.

"2. The right of the competing parties falls to be determined "by the presentations lodged for them respectively with the "Presbytery, and while that in favour of Mr Young is invalid "and ineffectual, proceeding from parties not entitled nor "qualified to grant the same, that in favour of Mr Park is valid "and effectual."

On the 11th of June, 1840, the Lord Ordinary (*Cockburn*) pronounced an interlocutor containing specific findings, embracing the several objections which had been taken to the votes on either side, but which it is not necessary farther to notice, because of the course which was taken on the hearing of the appeal. That interlocutor, and a note which was subjoined to it, so far as regarded the points argued at the hearing of the appeal, was in these terms: — "The Lord Ordinary having heard "parties, and considered the process, Finds, 1*st*, That the

" appointment to the office in dispute did not take place as an " election under the act 1690, chap. 23, but as a presentation " under the 10th of Queen Anne, chap. 12, and the relative " deed by the College of Glasgow, of date the 30th December, " 1726: Finds, 2*d*, That therefore it is only the names in the " two presentations that are to be taken into view in settling this " competition. Reserves consideration of all other points in the " cause, and of all questions of expenses, and appoints the cause " to be enrolled, in order that the parties may state how they " wish to proceed towards the application of these findings."

" *Note.* — *First*, The first thing to be settled is, whether the " appointment is to be viewed as an election under the act 1690, c. 23, " or as a presentation under the act of Queen Anne in 1711, restor- " ing patronage? The Lord Ordinary thinks it was a presentation. " The facts are, that while the act 1690 was in force, the parishioners " wished to buy, and the patron to sell, the patronage; and, accord- " ingly, an agreement was concluded, and the price paid. The pur- " chasers were only required by the statute to pay, 'upon the said " 'patron his granting a formal and sufficient renunciation of the said " 'right of presentation;' but in this case they did, in point of fact, " pay without obtaining any renunciation, though no doubt relying " upon it. While matters stood in this state, the act of 1711, restor- " ing patronage, passed. It declares that the way of calling ministers " under the statute of 1690 had proved publicly inconvenient, and " that there were cases where the price had neither been paid, nor " renunciations been granted. It therefore, on public grounds, re- " stores patronage to the patrons, with one single exception. This " exception is, that the act is not to take effect in any case where the " patrons have 'accepted of, and received any sum or sums of money " 'from the heritors, &c. in satisfaction of their right of patronage, " 'and have discharged and renounced the same under their hands.' " The patron here had not renounced, but having got the price, and " being aware, therefore, that it was his duty to do what he could to " make the corresponding return, he, (College of Glasgow,) in 1726,

" executed a deed narrating the transaction under 1690, the passing " of the act 1711, and then disponing 'the foresaid right of presen- " 'tation' to the heritors and kirk-session.

" It appears to the Lord Ordinary, that in these circumstances the " pursuers must be viewed as patrons. The arrangement by which " they meant to acquire the right of naming and proposing the minis- " ter to the congregation, under the act 1690, had not been carried " into full effect, when the act of 1711 restored patronage in favour " of all patrons who had not excluded themselves by having formally " renounced their rights. Their reception of the price is not made " sufficient. On the contrary, as the act 1690 was abrogated on " grounds of public expediency, its operation was made to reach the " case of all patronages not actually renounced. And this implied no " pecuniary injury to the incautious payers, because they had a right " of repetition. They did not seek repetition here, but claimed " fulfilment, in the only form then possible, of its contract from the " College, which the College honestly acceded to. But it is very " material to observe how this was done. It was not done by a mere " renunciation by the patron of his right, which is what is required " by 1690, and a consequent merging of that right in the people. " Both parties seem to have felt that after 1711 this would not do; and " accordingly the College grants, and the heritors take, a disposition " of the patronage, and in so far as this conveyance is to the kirk- " session, instead of the elders, it is not even in favour of the class " that was entitled by 1690 to acquire.

" Acting under this deed the parties are patrons, and must be dealt " with as such.

" *Second*, If this be their legal position, it is clear that it is only the " names on the presentation that are to be looked to, and not the " votes at any meeting. BROWN, 9th June, 1830."

The appellants reclaimed against this interlocutor, and on the 17th November, 1840, the Court (*First Division*) altered it in these terms: — " The Lords having advised this reclaiming note, " and heard counsel for the parties; Recal, *hoc statu*, the find-

" ings of the interlocutor complained of: Find that every " vacancy in the parish is to be supplied, not by election under " the act 1690, cap. 23, but in exercise of the right of patronage " conveyed to the heritors and kirk-session by the deed of 1725, " reserving consideration of the effect of the proceedings referred " to in the record; and farther, reserving all questions of ex- " penses, and remit to the Lord Ordinary to hear parties farther, " and do as he shall see just."

On the 9th of December, 1840, the Lord Ordinary pronounced the following interlocutor, adding the subjoined note: — " The " Lord Ordinary having heard parties under the remit from the " Court, and considered the record — Sustains the defences, " assoilzies the defenders, and decerns: Finds the defenders " entitled to expenses, subject to modification; appoints an " account thereof to be given in, and when lodged, remits to the " auditor to tax, and to report."

" *Note.* — The interlocutor of the Court fixes that this is to be con- " sidered as a case of patronage, and not as an election under the act " 1690, chap. 23. The pursuers having thus lost their principal " point, maintain that it was at least agreed or understood that the " person to be presented was to be determined by the votes at the " meeting of 4th August, 1836, and that not only the minority at that " meeting, but even those who were absent, if not to be held as con- " curring in, are at least barred from objecting to, the result there " come to.

" Now, 1*st*, The Lord Ordinary thinks that this view does not arise " out of the record. It implies that the parties knew that they were " obliged to exercise a right of patronage, and that they resolved to " do so, by first collecting the general sense of the patrons. But the " averment of their condescendence (Art. 4.) is, that they held that " they were not acting as patrons, but as popular electors, under the " act 1690; and their whole pleas are constructed in reference to this " fact. There is no part of the record that suits the view now taken.

" 2*d*, The Lord Ordinary sees no evidence whatever of any such

" compact or understanding. It is plain enough that the parties who " attended thought that that meeting would ultimately decide the " dispute, and that, under this notion, they used the word elected, and " other terms, which shew that they thought that what then took " place might at last prove conclusive. But that they meant to ex- " clude themselves from proceeding according to a correct view of " their legal position, or that the minority intended to abandon any " latent right that they might have, is not only not proved, but is plainly " contrary to the fact.

" 3*d*, At any rate, this alleged understanding could only bind those " who were present. It is said that the whole body of the electors, " including even the absent, were bound by the usage of the parish. " The fact as to the usage is denied. But at any rate, it is inconsis- " tent with the pursuer's own part of the record, where the averment " is, that all the vacancies have been filled up by elections: which " excludes the idea that the parties held their rights as patrons to be " controlled by the previous resolutions of the electors. The denial " is almost warranted by the single and admitted fact, that the deed " of 1726 was only discovered in 1793, since which there have only " been one or two vacancies prior to the present one.

" Besides, even though it were to be assumed that the matter lay " solely between the two parties present at the meeting, and that " both had understood that the vote there taken was to be final, the " Lord Ordinary would not hold that, after it was discovered that " they were wrong in their idea of their situation, but the means of " correcting their error was open to each, either was prevented from " doing so. Six heritors believe that they are popular electors under " the act 1690, c. 23; they therefore meet and elect a minister by a " vote. It is then ascertained that they were not electors under that " act, but patrons under the act of 1711. On this, some of them " choose to try the experiment of presenting under the statute, while " some do not. Can it be held that the first proceeding forms a " personal bar against the adoption of the second? The case of " Rutherglen (Brown, 9th June, 1830) is the best answer to this " question. That case was, in all its circumstances, fully stronger for " the pursuer's plea than this one is. Yet the Court, disregarding all

CULLEN v. SPROT.—5th Aug

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On the 9th of Dec eed of presentation,' (as it is termed the following inter pursuers can succeed in this action. But " Lord Ordinar fifty-four persons who sign this deed, not one " Court, and qualified by taking the oath to government. They " assoilzies before one justice, whereas the statute requires " entitled and under the express penalty of nullity. However " accou Courts may have been as to the time of taking the oath, " and talk of liberality of construction in reference to the case " failure to take them. The presentation by the defenders " subscribed by about sixty-seven qualified persons.

" Of these sixty-seven seventeen were not at the meeting of the " 4th of August; and it is a possible case, that though taking a deep " interest in this matter, they might reasonably stay away, because " there had been seven candidates proposed and heard preach, and " they may have been pleased with any of them. But Mr Young " was started at that meeting for the first time; so that they, finding " a new man proposed, might very naturally exercise their right of " patronage, independently of that meeting altogether. The Lord " Ordinary is quite clear that they at least are not bound by what the " meeting did. Now, holding that those present are bound, and " deducting the whole minority of fifty, there are still seventeen " qualified names to the one presentation, and none to the other.

" Besides, the question cannot be considered solely as between the " two parties of patrons. The presentee was no member of the " meeting, and can his rights under his unreduced presentation be " taken away by such disputes among a class of the patrons? They " may have broken their bargains with each other, but what is this

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On the 17th February, 1841, the Court adhered in these terms, — "The Lords having advised the reclaiming note for "John Cullen and others, pursuers, and heard counsel for the "parties; Adhere to the interlocutor reclaimed against, and "refuse the desire of the reclaiming note: Find additional ex- "penses due, and remit to the auditor to tax the account when "lodged, and to report."

The appeal was taken against these several interlocutors of the Lord Ordinary and the Court.

Mr Solicitor General, and Mr Hope, for the appellants. — Immediately on payment of the 600 merks by the heritors and elders, to the university of Glasgow, under the terms of the act 1690, the right of election vested in the heritors and elders by the statute; all that was then necessary to complete their title was the formal conveyance; accordingly the deed of 1725, executed by the University, completed the title of the heritors and elders under the act 1690. That act gave the right whether a renunciation had been executed or not. No doubt, the act of the 10th of Anne restored the right to the patrons, except where the money specified by the act 1690 had been paid in satisfaction of the right, and had been discharged under hand, and thus in terms omitted to provide for the case of the money

" the alleged compacts and understandings implied in previous meet-
" ings, resolved to look at nothing but the deed of presentation.

" But really all this is superseded by what followed.

" Because the pursuers (rather inconsistently with their statement
" in the record, that they were acting under 1690) were aware that
" a deed of presentation was necessary; and the minute bears that
" they appointed a committee ' to make and complete the presentation
" ' in his (Mr Young's) favour.' Accordingly, a deed of this descrip-
" tion was lodged with the Presbytery, and it is solely by giving
" effect to this ' corroborative deed of presentation,' (as it is termed
" in the summons,) that the pursuers can succeed in this action. But
" of the fifty-three or fifty-four persons who sign this deed, not one
" had previously qualified by taking the oath to government. They
" took the oath before one justice, whereas the statute requires
" two or more, and under the express penalty of nullity. However
" indulgent Courts may have been as to the time of taking the oath,
" it is idle to talk of liberality of construction in reference to the case
" of a total failure to take them. The presentation by the defenders
" is subscribed by about sixty-seven qualified persons.

" Of these sixty-seven seventeen were not at the meeting of the
" 4th of August; and it is a possible case, that though taking a deep
" interest in this matter, they might reasonably stay away, because
" there had been seven candidates proposed and heard preach, and
" they may have been pleased with any of them. But Mr Young
" was started at that meeting for the first time; so that they, finding
" a new man proposed, might very naturally exercise their right of
" patronage, independently of that meeting altogether. The Lord
" Ordinary is quite clear that they at least are not bound by what the
" meeting did. Now, holding that those present are bound, and
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" qualified names to the one presentation, and none to the other.

" Besides, the question cannot be considered solely as between the
" two parties of patrons. The presentee was no member of the
" meeting, and can his rights under his unreduced presentation be
" taken away by such disputes among a class of the patrons? They
" may have broken their bargains with each other, but what is this

" to him? A. holds a presentation from two of three patrons, will " he lose the benefit of it because the two promised to the other that " they would appoint B.? It is said that if it was wrong in the " minority to present, his right must fall. This is very doubtful, but " the seventeen are no part of that minority.

" It is also said, that he was a party to the arrangement that the " meeting should decide who should be presentee. This fact is no- " where properly set forth in the record. But at any rate, there is " no averment that, after what the meeting did proved abortive, " he could never accept a presentation from the only seventeen " free patrons."

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Mr Solicitor General, and Mr Hope, for the appellants. — Immediately on payment of the 600 merks by the heritors and elders, to the university of Glasgow, under the terms of the act 1690, the right of election vested in the heritors and elders by the statute; all that was then necessary to complete their title was the formal conveyance; accordingly the deed of 1725, executed by the University, completed the title of the heritors and elders under the act 1690. That act gave the right whether a renunciation had been executed or not. No doubt, the act of the 10th of Anne restored the right to the patrons, except where the money specified by the act 1690 had been paid in satisfaction of the right, and had been discharged under hand, and thus in terms omitted to provide for the case of the money

being paid and not discharged; yet, according to its true spirit and proper construction, the act must be intended to bring within the exception those cases where a purchase had been truly made, and the price paid, and to have specified the discharge *ex abundantia* as evidence merely of the purchase, for it can never be supposed to have intended to allow the price paid to remain in the hands of the seller, and the purchaser, nevertheless, to go without the subject of his purchase.

But at all events, the act of Anne offered no impediment to parties, who had received the price, completing the purchase by executing the necessary discharge and renunciation, if minded so to do, although it perhaps gave them the power of refusing. Accordingly the University did execute the deed of 1725, and whatever might have been the rights of the parties prior to its execution, subsequent to it, they were brought within the exception in the act of Anne. That act does not require to be read, as applicable only to the circumstances as they existed at the date of its passing, but may be read as applicable to the circumstances which now exist, or were brought about by the execution of the deed of 1725. According to these the 600 merks had been paid, and the right renounced and discharged within the literal terms of the exception in the act of Queen Anne. There was no consideration for the deed of 1725 but the payment of the 600 merks; it was no evidence of a new contract for the sale of the patronage, but a fulfilment of the previous contract.

[*Lord Campbell.* — No doubt it was the intention of the parties to fulfil that arrangement.]

In either view, then, the right of presentation was vested in the heritors and elders under the act 1690, by the payment of the 600 merks, and actual purchase, without the evidence of a formal renunciation, or by that, coupled with the subsequent execution of the deed of 1725, and fell to be exercised by them under the terms of that statute.

This view is confirmed by the practice in the parish, which

has always been, to exercise the right of presentation by vote at public meeting. The case of Campbell *v.* Stirling, 4th March, 1813, 17 *F. C.* 268, was the case of an election by meeting in this parish, and the question there tried was, whether the preses of the meeting had right to a casting vote. That question would never have been argued, and still less have been carried to appeal, if the election was not to be determined by the votes of the meeting, but the signatures to a deed of presentation.

[*Lord Cottenham.* — At the date of the deed of 1725 the call and reference to the congregation had been done away by the act of Anne. If the deed had been before that act, the act of 1690 might be the rule, but if after it, how could the act 1690 operate. The right in the congregation to object had been taken away; and the deed gives the right to be exercised as amply as the University could have exercised it if the deed had not been executed; referring to the acts of the parties, not to the statute 1690.]

We submit that the deed was to give effect to the act 1690, and that the case, by its circumstances, was excepted out of the act of Anne. The intention of that statute was, that after the purchase money paid, and deed executed, the party should be deprived of the right of patronage, but it was not necessary that the deed should have been executed, it was sufficient if executed after the date of the statute.

[*Lord Campbell.* — Is the deed in the same terms it would have been in if the act of Anne had never passed?]

We submit it is in exactly the same terms. It is not a disposition, as supposed by the Lord Ordinary; it "renounces, transfers, and dispones."

[*Lord Campbell.* — What notice is there in it of the act of 1711?]

Mere reference to its existence.

[*Lord Cottenham.* — I apprehend there was nothing in the act

of Anne to prevent the University from conveying the right necessary to be exercised in terms of the act 1690.]

Perhaps not, if nothing had been done previously, but the deed here was a completion of what had been commenced previously to the act of Anne.

[*Lord Cottenham.* — Does it appear whether the heritors and kirk-session presented to the congregation, or at once proceeded to appoint?]

The practice in the parish has been to call a public meeting of the heritors and elders. The person chosen by this meeting was presented to the congregation, who thereafter either gave him a call, or stated objections to the presbytery, to whom the minutes of the meeting had previously been reported, sometimes accompanied by a *pro forma* deed of presentation referring to the minutes, and sometimes without any deed at all. The presbytery then appointed a day for moderating in the call, and on that day the approval or disapproval of the congregation was taken.

[*Lord Cottenham.* — That would be the course under an ordinary right of presentation; but is there no evidence of a formal tender to the congregation?]

There is no distinct evidence of the practice on former occasions.

[*Lord Cottenham.* — I don't see any tender of Mr Young to the congregation. The presbytery were required to proceed on the deeds of presentation. Under the act 1690 the presentation to the congregation preceded the application to the presbytery. I pursue this with a view to see the evidence of practice.]

But if the act 1690 does not regulate, still after the arrangement between the parties, which they were competent to make, that the election should be at a meeting, it could never be competent for the respondents, having ascertained the sense of the meeting, to go behind the backs of the appellants, round the parish, and obtain signatures to a deed to supersede the vote of

the meeting. The protest of Brown objected only to the right of voting in certain parties, and treated the matter as at an end, except as regarded the effect of a scrutiny. Obtaining signatures to the deed in such circumstances was a fraud on the appellants which can never be allowed to stand.

Even as to the deed, supposing the case to be one of proper patronage, the respondents are in no better situation; it is true there are more signatures to their deed than to that of the appellants, but there is no dispute that these signatures are not of a majority of the voters. If the election is to be by meeting, duly published, it matters not what number are present, the whole voters might be present if they would. But if the election is to be by deed, neither of the parties can select what number of the voters he may choose to exercise the right, by omitting to apply to the others. The deed, therefore, to be effectual, must have the signature of a majority of the entire voters. There is no evidence that the voters, whose signatures are not attached to the deed, were ever applied to, or had any knowledge of the existence of the deed, nor of how they would have exercised their right had they been aware of its existence. Accordingly the deed of presentation by the respondents acknowledges the necessity of a majority, by professing (though falsely) to be made by a majority. To dispense with the signatures of a majority, and at the same time to hold the deed as what alone can be looked at, would be to sanction a course fraught with opportunities for fraud.

Mr Pemberton, and Mr Anderson, for the respondents. — There cannot be any right under the act 1690 unless by that act itself; it cannot be both by the statute and the deed, for the deed never once refers to the statute. The act gives the right to the heritors and elders, while the deed gives it to the heritors and kirk-session. The statute gives to the heritors and elders power to select a person, who should be presented to the heads of families, (strictly

speaking, the parishioners,) by whom the party selected was to be approven or disapproven, the matter being to be judged of by the presbytery. This was not to give a right of patronage or presentation, but, in truth, to give a right of election, dependent on the approbation of the congregation. The conveyance of this right was by the statute itself, not by the renunciation of the patron. A mere renunciation would be a nullity, but operating with the statute it completed the conveyance. The deed, on the other hand, conveys out and out the direct right of presentation to the heritors and kirk-session, without any reference to the congregation for their approval or otherwise. But conceding to the deed all the effect that is argued for it by the appellants after the passing of the statute of 1711 no act done could give the same right as existed under the act 1690. It was not possible for the parties to defeat the policy of the legislature virtually to repeal the act of 1711 as to this parish, by abolishing the right of patronage in it, and acting under the statute 1690, which the act 1711 had repealed.

[*Lord Cottenham.* — They could not have given the right to the presbytery, for instance.]

Exactly. Whatever they might do equitably to regulate their private rights, they could not restore that which the act 1711 had abolished. Taking the case not to be within the exception of the act 1711, the right of patronage was restored as it had existed previously to the act 1690, and it was no part of the object of the exception to the act 1711 to restore the mode of elections created by the act 1690. The parties who had paid the 600 merks, and obtained the renunciation directed by the act 1690, became, under the terms of the act 1711, the patrons entitled to exercise the right of patronage, not according to the mode prescribed by the act 1690, but as ordinary patrons; *Ersk.* I. 5, 19, so lays down the law.

No doubt it was the intention of the parties, by the deed of

1725, to complete the arrangement which had been begun prior to the act 1711. It is plain they intended to give some right to be exercised by some party, but both the right given, and the exercise of it, must be consistent with the law as altered by the act 1711. They could only give what by law they might give, and that was an ordinary right of presentation.

[*Lord Cottenham.* — You say only cause of exceptions in the act 1711 was to prevent the right going back to the parties who originally had it, but not to keep alive as to the case, excepted the mode of electing created by the act 1690, but done away by the act 1711.]

Exactly. And if this be correct, then the case of Brown *v.* Johnstone, 8 *S.* and *D.* 899, has fixed that where the right of presentation is in the parish, the deed of presentation is all that can be looked at, however many public meetings there may have been. The meetings are only, that the persons entitled to present being a numerous and scattered body, may come to some general understanding as to what it might be proper to do, but the execution of the formal deed is the only mode by which the right of presentation can be exercised.

As to the effect of any alleged agreement between the parties, to exercise the right of presentation by election at public meeting, and not by deed of presentation, that question cannot be raised upon the record. The summons proceeds entirely on the assumption, that the right was to be exercised by popular election, under the act 1690, and the condescendence is framed on the same view, but this is manifestly inconsistent with the notion of the agreement alleged, which would imply the existence, not of a right of popular election, but of ordinary patronage, and an arrangement merely as to the mode of its exercise.

But there is no evidence of any such agreement. The meeting was held according to the ordinary usage of the parish, merely for the purpose of ascertaining the general feeling, but not for the

exercise of the right of patronage, that being done by deed of presentation, which invariably and indisputably was always used, whether there had been previous meetings or not, and without regard to what might have passed at them.

Mr Solicitor General in reply. — In whatever way the right may be vested, and whatever appellation it may receive, that of presentation or of election, there must be a form for ascertaining the sense of the body entitled. The question, taking it upon the deed, is not between two competing deeds, whether the one has more signatures than the other, but whether the deed in favour of the respondent Park expresses the sense of a majority of those entitled; any number of signatures that he might choose to obtain, provided only it exceeds the number obtained by the appellant Young, could never conclude the other parties entitled, who might never have been applied to by either. The same course should be taken as to this parish as has been held in England in regard to parishes having the same right to exercise, where the vote of the majority at a public meeting has been held to express the sense of the majority of those entitled to elect. If so it is immaterial whether the right is to be exercised under the act 1690 or not.

The ordinary rights incident to patronage never were transferred by the act 1690, these remained with the original patron; all that was given by that act was the solitary right to present. In the cases, therefore, excepted from the repeal of that statute, the parishioners were not patrons entitled to exercise the right of patronage in the ordinary form, but were merely electors, as they had been previous to the repeal. And the only way in which the right of election, in such a case, can be exercised, is by the majority at a public meeting. In England the cases are without end in which this has been recognized, Attorney *v.* Parker, 3 *Ath.* 576; Attorney *v.* Forster, 10 *Ves.* 339;

Faulkner v. Elger, 4 *B.* and *Cr.* 449; Edinboro v. Canterbury, 2 *Russ.* 93.

[*Lord Cottenham.* — Do you concede that if the deed had been signed by a majority that would settle the question?]

I am not inclined to admit that, for I think a meeting was the proper mode to ascertain the sense, King v. Davie, 6 *Ad.* and *Ellis*, 374. It is not inconsistent that a deed may be necessary, and that there should be a previous meeting, especially if the deed is consistent with the vote; but if the deed is inconsistent with the vote, can you look at the deed without regard to the vote? In Brown v. Johnstone there was a regular disposition of the patronage, and the question raised was, whether the right was in the heritors and elders alone, or jointly with the feuars.

[*Lord Campbell.* — The Lord Ordinary discarded what took place at the meeting, and the Court adhered to his finding.

Lord Cottenham. — Brown raised the question as to the meeting and the deed in one of his pleas.]

But if that case did lay down such a rule, it can never receive the sanction of this House, and at all events, it does not appear, in that case, whether the signatures to the deeds were not of the majority, while here we have averred that they are not of the majority.

Mr Anderson, in reply to the cases cited in the reply of the Solicitor General, called the attention of the House to Grant v. Gordon, *Mor.* 9945, as shewing that where the right was in several patrons, if one only exercised the right, that had been held sufficient.

[*Lord Campbell.* — There the parties had the right individually, not collectively, but can you refer to any case where the right has been collective?]

I am not aware of any but Brown v. Johnstone.

LORD COTTENHAM. — My Lords, the first question in this case, is, whether the right of appointing a minister to the parish

of Cadder is vested in the heritors and kirk session of that parish under the act of 1st William and Mary, in the year 1690, and to be exercised according to the provisions of that act, or as ordinary patronage under the deed of 1726. It appears to me, that the latter is the real title.

The act of 1690, destroyed patronage, and established a new and totally different scheme for the appointment of ministers. The heritors and elders were to propose a person to the whole congregation, to be approved or disapproved by them. If they disapproved, they were to give the reasons, to the effect that the affair might be cognosced by the presbytery, by whose judgment and determination the calling and entry of a particular minister was to be ordered and concluded. Six hundred merks was to be paid by the parish to the patron, in consideration of the patronage so taken away, upon his granting a sufficient and formal resignation of his right of presentation in favour of the parish. But, when the patronage was in the crown, the crown was denuded of the right by the mere payment of the six hundred merks.

It appears, that the six hundred merks were duly paid to the University of Glasgow, the original patrons, but no renunciation of patronage was executed by them.

In this state of things, the act of 10 Anne chap. 12. passed, which repealed and made void the act 1690; and restored the right of patronage to every patron who had not made and subscribed a formal renunciation, provided always, that the patronage should not be restored where the patron had received the money, and discharged or renounced the right of presentation.

The provisions of this act are very positive, and very distinct. The University of Glasgow, although they had received the 600 merks, had not, as required by the act, "made and subscribed a "formal renunciation of their right of patronage;" and, therefore, by the express enactments of that act, the right of presentation to this parish was restored to them. The University, however,

having received the 600 merks, were properly desirous, as far as possible, of giving to the parish the benefit of what they had so paid for; and, accordingly, in 1726, a deed was executed, by which they renounced, transferred, disponed, and overgave to the heritors named, of the parish and their successors, and the kirk session of the parish, the right of presentation of a minister, with power to present ministers as fully as the University could have done, if that deed had not been granted.

It is evident from the terms of this deed, that the parties were well aware of the state of the law at the time. If they had considered this parish as coming under the exception of the act of Anne, and the mode of appointing ministers as regulated by the act of 1690, there would have been no patronage to be transferred to the heritors, and there could not have been any right of presentation in the heritors and kirk session, all patronage being by that act abolished, and a mode of appointing ministers substituted inconsistent with any right of presentation. But inasmuch as the University had not before the act of 10th Anne, made and subscribed a formal renunciation of their patronage, all parties seem to have been aware, that that act restored to the University the patronage, and they executed a deed which assumed that it was vested in them, and which transferred to the heritors and kirk session their right of presentation to be thereafter exercised by them.

It was contended, that this deed ought to be considered as giving to the parish just such rights as they would have been entitled to, if the act of Anne had not passed. But, in the first place, that is not the purpose of the deed, and for a very good reason, namely, that in the then state of the law, such an arrangement could not have been effected. The act of 1690 had been repealed, as to all parishes at least not within the exception of the act of Anne; and even if the parties could have established a scheme similar to that provided by the act of 1690, so far as they were themselves concerned, they could not have given the power to the

presbytery, and have imposed upon them the duties provided by the act, and which constituted a very important part of the scheme.

It seems, indeed, to have been assumed, that even in those parishes in which a renunciation had been executed before the act of Anne, the parishes now enjoy the right as patronage, and not under the act of 1690. But in the present case, it appears to me clear, that the right of presentation is vested in the heritors and kirk session under the deed of 1726, as patronage, and not to be exercised according to the scheme of the act of 1690.

If this be so, there is very little more to be considered in this case. The question of agreement, which is not raised by the summons, but which was inquired into in the Court below, is no longer open to discussion. The pursuer does not insist that, looking to the two presentations, more electors have signed that in favour of Mr Young, than have signed that in favour of Mr Park. A scrutiny was declined below, and, therefore, could not be, as in fact it was not, asked of this house. The pursuer, however, says, that those who had signed the presentation in favour of Mr Park, do not constitute a majority of the whole of the electors. That cannot be material. Those who do not chuse to interfere cannot prevent the exercise of the right by those who come forward to exercise it.

The pursuer then says, that the right can only be exercised at a public meeting, and that the decision of the public meeting was in favour of Mr Young; and the English cases, and particularly the Attorney General *v.* Parker, in 3d *Atkyns*, 576, and the Attorney General *v.* Forster, in 10th *Vesey*, 339, were referred to. In these cases, the public meeting was not for the purpose of presenting or appointing, but for the purpose of instructing the trustees, in whom the right was vested for the benefit of the parish. Those who met, could not be parties to the presentation or appointment. Whereas, in the present case, none ought to

have been present, but those who would have been proper parties to the presentation; and under those circumstances it has been decided in Scotland, in the case of Brown v. Johnstone, in 8th *Shaw and Dunlop*, 899, that the presentations only are to be looked at, and that what passed at any previous meeting, is not to be regarded.

Independently of that authority, it would lead to strange consequences if it were to be laid down as a rule, that where a presentation is vested in many, there must be a public meeting. To what number is the rule to apply, and what knowledge can the authority to whom the presentation is made, have of what took place at the meeting?

If, indeed, fraud and improper dealing had been alleged and proved, what passed at the meeting might have formed a material ingredient in the case. But there is no such question upon this record. The summons impeaches the qualification of some of the parties who signed the presentation in favour of Mr Park, but it does not seek to reduce the deed upon any ground of fraud or breach of agreement. It prays, that it may be declared void, merely upon the ground that it was not in conformity with the decision of the majority of the meeting, which, it insists, was conclusive, because the right was to be exercised under the scheme of the act of 1690.

I am of opinion, therefore, that the pursuer has failed in all the grounds upon which he rested his case; and therefore move your Lordships that the appeal be dismissed with costs.

Lord Campbell. — My Lords, it gives me the most sincere satisfaction, that my noble and learned friend has come to a clear conclusion in his own mind in favour of affirming this interlocutor, because I have no doubt whatever, that in this manner the merits of the case are properly disposed of. For upon the result of that meeting of the 4th of August, I have no doubt at all that Mr Park had a majority of legal votes. With respect to those

heritors of Chryston, who voted in favour of Mr Young, who are supposed to have carried the majority, it seems to me, that they clearly had no more right than the heritors of any other parish, or any other chapelry within the kingdom of Scotland.

That being so, I am very much rejoiced to think that Mr Park, who has for a considerable time been in possession of the living, will still continue to enjoy it. But I own, my Lord, that I did entertain considerable doubt upon some of the questions which were argued; first, as to whether, supposing that the transaction had been completed by renunciation as well as the payment of the 600 merks, whether in that case, the election ought not to be under the act of 1690. That seemed to me by no means clear, and I should, though not having a strong opinion, have been inclined to think that the act of 1711 did not apply to cases where the transaction had been completed before that act passed.

Then, as to the second point, whether this deed of 1726, did not place the transaction upon the same footing as if that deed had been executed before 1711, it seems to me, that there are reasons entitled to some weight for considering that that deed is to be referred to the time when the 600 merks were paid, so as to place things on the same footing as if the renunciation had taken place before the act of 1711.

Again, supposing the right of election to be in the body, there seems to me to be great difficulty in knowing how it is to be exercised, except at a public meeting; because, it is not a case where there are several patrons, however large the number may be, who of their own right exercise the patronage, but where they exercise it as members of a public body, as heritors of the parish, or as elders of the kirk session. In such a case, it seems to me that there is great difficulty in saying that the mode of proceeding in England ought not to be adopted; and that would be done in the most satisfactory manner, by, according to usage, giving notice of the meeting, and when the meeting takes place ascertaining

the majority of legal votes in the usual manner. But, however, upon these points, I by no means entertain any opinion upon which I am at all inclined to advise your lordships to act; and I again express my satisfaction that my noble and learned friend is clearly of opinion in favour of affirming the interlocutor, which is the subject of the present appeal; and I am of opinion, also, that it should be affirmed with costs.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor, in so far as therein complained of, be affirmed with costs.

THOMAS DEANS — W. L. DONALDSON, Agents.

[Heard, 7th March. — Judgment, 5th August, 1842.]

THE GENERAL CONVENTION OF ROYAL BURGHS OF SCOTLAND, and the COMMON AGENT and PRESES of the Convention, *Appellants.*

CHARLES CUNNINGHAM, and CARLYLE BELL, Conjunct clerks to the Convention, *Respondents.*

Public Officer. — In the absence of any proof of usage to the contrary, *held*, that the appointment of clerk to the Convention of Royal Burghs, (a body of an anomalous character, partaking in some respects of corporate qualities) without any express term of endurance, did not necessarily import an appointment for life.

Ibid. — Where the salary of an officer of a public body, was the subject of an annual vote, — *Held*, that the body had a right to regulate the amount of salary, by increase or reduction, at its pleasure.

Corporation. — Whether the Convention of Royal Burghs is a corporation. *Query.*

THE General Convention of Royal Burghs of Scotland is a very ancient institution, recognized by various royal charters and acts of Parliament; and among others by the statute James III. Parliament 14th, cap. 111; the statute James VI. Parliament 5th, cap. 64; the statute James VI. Parliament 7th, cap. 119; the statute James VI. Parliament 19th, cap. 6; and an unprinted act of Parliament passed in the year 1607.

The Convention consists of commissioners or delegates appointed by all the royal burghs in Scotland, to administer the affairs and exercise the powers of the Convention. It has very important powers, privileges, and jurisdiction, which it has exercised for time immemorial; and, *inter alia*, it has been in use to make regulations with regard to the trade and shipping of

burghs; to protect the privileges of burghs and burgesses; to decide in controversies between different royal burghs, and even between burghers and the magistrates; to levy certain dues from the burghs generally, and to grant aid occasionally to burghs appearing to stand in need of it; to impose fines upon its own members and upon burghs contravening its regulations. The sentences which it pronounces have been in use to be acknowledged by the courts as the sentences of a legal tribunal, and have been carried into effect by means of legal diligence. The meetings are annual, lasting only three days generally, and when the business is concluded, the meeting is dissolved, not adjourned; and in the interval between this and the next annual meeting, the interests of the burgh are attended to by a committee of the Convention. What money is required for expenditure, is voted annually, and raised by an assessment upon the burghs, under the authority of the statute of James III.

Among other officers of the Convention, there used to be a clerk and recorder. The duties of the clerk were,— the issuing the annual missive calling the Convention together on a particular day, as directed by the previous meeting, — preparing for each meeting, by arranging all the books and papers, carrying to the place of meeting, and making out an abstract of the routine business to be laid before the preses, — superintending the election of preses, and swearing him into office, — scrutinizing the commissions of the members of Convention, who are 126 in number, and of seeing the requisite declaration by the members duly signed, — swearing in all the members, after their qualification for sitting as members has been duly examined and reported upon and minuted, — reading various acts of Convention which are directed to be read at each Convention, — reading the minutes of the annual committee, and minuting whatever enactments may be made thereupon, — giving attendance during the whole period of all meetings of the General

Convention, and likewise at their annual or other committees, — framing the minutes of these meetings, in order to their being engrossed, and afterwards attesting the correctness of the record, — authenticating the sentences pronounced by the Convention, — certifying the annual missives to the burghs, and answering such queries as from time to time may be put to them by the individual burghs, on points regarding which they require information.

The duties of the recorder, again, were to record the proceedings of the Convention, and of the different meetings of the annual committee—to keep the record and productions in a safe place, and give access to them at all times to the members of the Convention, — to engross in the records of the sets such alterations in the different sets of the burghs as might be made from time to time — to prepare the business of each day's meeting, and make out the rolls and memoranda of the proceedings.

In the year 1808, Gray and Dundas were conjunct clerks of the Convention; upon what terms did not appear. On the 13th of July, 1808, Gray resigned his office, and the Convention, by act of that date, appointed Gray, and Cunningham, the appellant, to be conjunct clerks, "jointly with John Dundas, with survivancy to the longest liver of them the said John Gray, and Charles Cunningham," "with power to serve the said office as fully and freely in every respect as any of their predecessors could, or might have done, or which to the office of conjunct clerk to the Royal Burghs of Scotland, by law or custom, does appertain, giving and hereby granting to the said John Gray, the fees, salaries, and emoluments, belonging to the said office during his natural life."

On the 9th day of July, 1816, on the occasion of the death of Dundas, the Convention appointed the appellant, Carlyle Bell, to be his successor in the same terms, *mutatis mutandis*, with the appointment of Gray and Cunningham.

Previous to 1712, the salary of the clerk to the Convention, was L.40 per annum, and of his deputy, L.8, 6s. 8d. In 1712, the Convention passed an act in these terms: — "The Convention direct their agent to pay the salaries and gratuities following; and the assessor for the burgh of Glasgow protested against all gratuities and augmentations of salaries, and thereupon took instruments in the clerk's hands; to which protestation the assessors of the burghs of Perth and Dundee, and the Commissioners for Aberdeen and Aberbrothick, adhered thereto. To the principal clerks, of ordinary salary, L.480 Scots, and L.240 Scots for their extraordinary pains. To the depute-clerk, L.100 Scots of ordinary salary, L.120 Scots for extraordinary pains." These sums (being L.40 sterling of salary and L.20 sterling of gratuity to the principal clerks, and L.8, 6s. 8d. sterling of salary and L.10 of gratuity to the depute,) accordingly appeared in the acts of 1713, as included in the agent's account. In 1713, there being by this time two conjunct clerks, the Convention passed the following act, "The Convention appoint their agent to pay to the two principal clerks L.50 sterling money equally betwixt them, as their salary for this year's service, and the like salary yearly in time coming in lieu of all gratuity. Item, To James Naysmith, their depute-clerk, L.15 sterling money as his salary for this year's service, and the like salary yearly in time coming in lieu of all gratuity."

At the date of Gray and Cunningham's appointment, the salary of conjunct clerk was thus L.25 to each. On the 13th of July, 1815, the Convention increased the salary to L.50 each.

On the 15th of July, 1824, the Convention abolished the office of recorder, and imposed upon the conjunct clerks the duties which had theretofore been performed by that officer. The salary which had been in use to be paid to the recorder, was L.50 per annum, but when his duties were transferred to the

conjunct clerks, the transference of the office was not accompanied by a transference of the salary, nor by any increase in the emoluments of the clerks.

On the 9th day of July, 1834, the Convention passed an act, resolving, that its establishment of officers was extravagant and unnecessary, and on the 10th of July, they reduced the salary of the conjunct clerks to L.50 between them. The clerks protested against the making of this reduction at any future time under form of instrument, which was put upon the record of the Convention, but without disturbing the resolution of reduction for the current year.

On the 16th of July, 1835, the Convention farther reduced the salary of the conjunct clerks to L.35 between them.

In December, 1835, the respondents brought an action against the Convention, for reduction of those acts of date the 9th and 10th of July, 1834, and 16th of July, 1835. This action was served upon the common agent, appointed by the Convention, and their preses. The defence was, that the defenders had not been cited. To obviate this objection, the respondents brought a new action, which was served upon the Convention, while assembled, and concluded for reduction of the acts mentioned, and to have it declared, that it was "*ultra vires* of the Convention "to add to the duties of the pursuers, as conjunct principal "clerks of the Convention, except by their own consent, or in "any way to diminish or reduce their salary of L.100 between "them: That the pursuers had a vested life interest in their "office, and in the fees, salary, and emoluments thereof; and "that, accordingly, each of them was entitled to a salary of L.50 "sterling for the current year, and for each succeeding year of "his life, unless he either should voluntarily resign, or should "forfeit his right to the office."

The pleas maintained by the respondents in support of their action were: —

" I. The office of conjunct clerks, with the salary and other " emoluments which were attached thereto, do by law and im- " memorial usage belong to the grantees thereof *aut vitam ad* " *culpam;* and that office, with its salary and other emoluments, " having been granted to and vested in the pursuers respectively, " and neither of them having been guilty of any fault, the Con- " vention had no power to deprive either of them of his office, or " of any part of the salary which was attached thereto.

" II. *Separatim.* — The pursuers having obtained from the " Convention express grants of the offices, and of the emolu- " ments thereto attached, and it having been expressed, or at " least implied in these grants, that they were made during the " lifetime of the grantees; these grants having been accepted " and acted upon for a course of years, the Convention is not " entitled to revoke or alter the same, or to deprive the grantees " of the offices, or of any part of the emoluments so granted.

" III. The acts, resolutions, and minutes under challenge, are " null and void, in respect of their being contraventions of the " rights so vested in the pursuers.

" IV. The reduced amount of the sums which by these acts, " minutes, or resolutions are proposed to be allowed to the pur- " suers instead of their full salaries, would not afford nearly an " adequate remuneration for the performance of the duties, and " the responsibility attached to their offices.

" V. The acts, resolutions, and minutes under challenge, " never were acquiesced in by the pursuers; but were always " objected to and protested against by them."

The defences maintained by the appellants, on the other hand, were: —

" I. The acts done by the Convention within the powers con- " ferred on them by their constitution, and in the regulation of " their own affairs, as in the appointment of clerks, &c., or in " fixing their allowances, are not subject to review in any court, " but are of themselves final and conclusive.

"II. The appointment under which the pursuers hold their "offices is not for life or fault, nor is the salary unalterably fixed; "but they hold their offices during the pleasure of the Conven- "tion, and for such salary as the Convention may choose from "time to time to modify and allow, and, therefore, cannot ob- "ject to a reduction of the allowance, if the Convention see "cause, such reduction being made in exercise of the same "powers under which the Convention has at different times aug- "mented the salary.

"III. The Convention of one year, being a representative "body annually elected, have no power to bind the Conventions "of any other years, or limit or contract their powers."

The only evidence in regard to former appointment of clerks to the Convention, and the nature of the tenure under these appointments, was the following entries in the records of the Convention.

The first was an entry on the 6th of July, 1654, in these terms: — "The same day, anent y^e^ 9th act of the General Conventione "of burrowis, haulden at y^e^ burgh of Edin^r^, the 12^th^ of Aug^t^. "1652, upon ane order frome the Commissioners frome the "Commonweall of England, anent the electione of William "Thomsone, common clark of Edinburg, to be sole gnall. clark "to the burrowis dureing thair pleasur, with power to him to "exercise the samyne, and granting to him all privileges, fies, "and casualties y^rto^ belonging, or w^ch^ ever belonged to any of "thair former clarkes, and declairing all former actes maid in "favor of any former clark to be frome that tyme furth voyd, "null, and of no effect: The prnt. Commissioners of burrowis "now conveined therefore approves and confirmis the said act "in y^e^ haill headis and clausis, circumstances and conditiones "yairof, and ordeines y^e^ same to stand in force and effect dure- "ing thair pleasure."

Sir William Thomson having, it appears, deserted the service of the Convention, the Convention of 1665 elected a clerk

in the following terms: — ' 6th July, 1665. — The same day, " the pn^t Commissioneris of Borowes nominates and electis " George Chein to be their g^al clerk dureing this pnt. Con- " ventione, with power to him to extract and subscryve all acts " maid y^rin, and this to continow allenarlie dureing the borowes " pleasure, who compeired, accepted, and gave his oath de " fideli."

On the 4th of July, 1666, there was another entry in these terms: — " The q^lk day the Com^rs of the Royal Burrowes met " in a Gen^l. Convention, taking to their serious consideratioun " that Sir W^m. Thomsone, late town-clark of Edin^r., was elected " clarke to the s^d Convention dureing their pleasure allenerlie, " and that thereby it is in their power to declair the said place " vaccant, so often as they shall find it meat and expedient for " their service and affairis; and farther, that the s^d Sir W^m. " Thomsone has willfullie deserted his charge, by absenting " himselfe, and withdrawing his service at this tyme, without any " lawf cause made known to the Convention, either be himselfe " or any other person in his behalfe: Therefor, and for sundrie " other weightie causes moveing them thereto, the s^d Conven- " tion declaire the place to be vaccant, and at their disposall, and " all acts, ane or mae, for electing or continuing Sir W . Thom- " sone, or any uther former clark, to be clark to the said Con- " vention, to be now, and in all tyme coming, voyd and null in " the haill heidis, articles, and clauses thereof."

Sir William's successor was elected by the following minute:—

' *4th July*, 1666. — Act 3.

" The s^d day the Convention of y^e Royal Burrowes of this " kingdom, taking to y^r consideratioun y^t be y^r act of y^e daite " of thir prnts. they have declared the place of clark to the " borrowes vaccant and at y^r disposal, and y^t necessar it is y^t " y^e s^d place be filled w^t ane able and weill qualified persone,

" and being sufficientlie informed of y^e^ abilities and uther good " qualifications of M^r^ Thomas Young, toune clark of Ed^r^. for " y^e^ discharge of y^e^ s^d^ office: Therefore they doe elect, " nominat, and appoynt the s^d^ M^r^ Thomas Young to be clark " to y^e^ s^d^ Convention of Burrowes of this kingdome, generall " and particular, dureing y^r^ pleasur allenerlie. W^t^ all privi- " ledges, liberties, and immunities y^rto^. belonging, w^t^ power to " him, by himselfe, (or in caice of his necessar absence, upon " a sufficient excuse, to be allowed of be y^e^ Convention for y^e^ " time, by such person as he, w^t^ consent of y^e^ s^d^ Convention " shall appoynt) to exerce the said office during the tyme fore- " said, and to uplift y^e^ fies, dues, and casualties y^rto^ belonging, " sicklyk and als freely as any uther clerk formerlie did, or " laufully might have done; who compeired, accepted, and gave " his oath *de fideli administratione.*"

Mr Thomas Young having died, the Convention of 1669 elected and nominated Mr James Roughead, town-clerk of Edinburgh, to be general clerk of the burghs "during their pleasure; and grantis and allowis to him all casualties, fies, " and immunities belonging thereto, with power to him by " himself, or in case of his necessar absence, upone a sufficient " excuse to be allowed of be y^e^ burrowes for the tyme by such " a person as he, with consent of the said burrowes, shall " appointe, to supply y^e^ said office dureing y^e^ tyme foresaid, " and to uplift the fies, dues, and casualties thereto belonging, " sicklyk, and als freelie as ony oy^r^ clerk formerlie did, or " lawllie might have done; who compeired, accepted, and " gave his aith *de fideli administratione.*'"

The Lord Ordinary (*Cuninghame*) ordered cases to be boxed to the Court.

On advising the cases the Court (First Division) pronounced the following interlocutor:—" The Lords having advised the " mutual cases in the conjoined actions, decern and declare in

" terms of the libels of the original and supplementary actions:
" Find the pursuers entitled to expenses, and remit the account
" to the auditor to tax the same, and report."

The appeal was against this interlocutor. In the papers in the Court below a very elaborate history of the Convention of Royal Burghs was gone into, with the view of shewing the very ample powers which that body had enjoyed from a remote date — powers of a legislative, ministerial, and judicial character; and an argument was founded upon this, that the determinations of the Convention in matters properly within their jurisdiction being conclusive, and not subject to appeal, *multo fortiori* must their determinations as to the duties to be performed by, and the remuneration to be paid to, their own officers be conclusive, and therefore the Court of Session had no jurisdiction to entertain the questions raised by the respondents' action. This position, however, though mooted at the bar, was given up by the counsel for the appellants in their opening.

Mr Stuart and Mr Gordon for the appellants. — I. The foundation of the respondents' action is, that they hold their appointments for life, and to support this position they affirm the Convention of Royal Burghs to be a corporation, and a body therefore capable of conferring such an office. For this, however, there is no authority. However indisputable it may be that the bodies — the several Royal Burghs — who elect the members forming the Convention, are themselves corporations, that will not of itself constitute the Convention a corporation. A body of delegates, because its members come from corporations, does not therefore become a corporation itself. Although the powers conferred upon the Convention by the act 4 James III. cap. 111, ratified by 5 James IV. caps. 64 and 119, and preserved by the 21st art. of the Union, are very extensive, there is nothing in any of these statutes which confers upon it the

characteristics of a corporation; neither is there any authority for saying that they have been acquired by usage.—1. The Convention has not perpetual succession, an essential requisite to a corporation; its meetings are annual, lasting only for a few days in each year; the members are elected each year by the burghs which they represent, and on the last day of meeting in each year, the meeting is not adjourned, but dissolved. The body then ceases to have existence, and the members to have any character other than what they enjoyed previous to receiving their commissions. If any meeting should require to be held between the period of dissolution and the next annual meeting, it does not consist of the same persons who were members at the period of dissolution, acting under the commission which they then held, but is composed of persons acting under new commissions given for the occasion. 2. The Convention cannot hold real property, another essential requisite to a corporation. Supposing them to do so, in whom would the fee remain after the dissolution of the body, or who, in such a case, could be made liable for the prestations to the superior? 3. There is no instance of any contract or obligation entered into by the Convention, with the exception of one in 1692, between it and a Mr Buchan, referred to in Buchan *v.* *Brown's Supp.*, but so little did the parties trust to the validity of the contract in that case, that they had it ratified by Parliament by the act 1639 cap. 30. 4. The Convention, then, had no power to appoint the respondents for life, as this would have been an exercise of power incompatible with its own existence. If it had entered into any such contract, in what manner could it be enforced? the body has existence but for three, sometimes only two days; unless the creditor should accomplish his relief in that space of time, it is gone for ever, as the body has then ceased to have existence. That this is so is admitted by the manner in which the respondents obviated the objection to the citation in the first

action; feeling that the common agent and the preses did not represent the body, that there was no other person who did, and that the only way of reaching the body was by service upon it while in actual sitting, they took that method of citation in their second action.

[*Lord Campbell.*—If the body is not a corporation, suppose the salary of the respondents not to be paid, would they have no relief?]

If decree were given in this action against the Convention, upon whom could the messenger serve execution, or what effects could he attach? the last Convention is dissolved, and the next is not yet created, and if it were, it does not represent the last. Each Convention meets with the powers given to it by the statute for the current year, and that only; and accordingly each Convention has a right to determine for itself what establishment of officers it will have, and upon what terms; and if the salary of the clerks were not paid, the claim for it might be good against the common good of the burghs, or perhaps against the individual members of the Convention as the members of a voluntary association, but it could not be made effectual in any way against the Convention itself.

II. In the acts of the Convention appointing the respondents to their office, there is nothing implying what is to be the term of its duration, while the only evidence of previous appointments shews that the office has been held during pleasure only, and there is nothing in the nature of the duties to be performed which should make it have a permanent character. No doubt town clerks have been found not to be dismissible at pleasure, but to hold their offices *ad vitam aut culpam.* That was upon the principle that they had duties to perform to the community of the burgh apart from those they owed to the corporation of the burgh, and that therefore they must be held to enjoy their

office upon such terms as might ensure to the community a due performance of its duties. Even as to them, however, it is an open question whether their office is one for life, Mags. of Annan v. Farish, 2 *Sh.* and *M'L.* 930. But the respondents have no duties to perform except what they owe to the Convention itself, by which they are appointed, they cannot therefore be said to be even public officers, in the proper use of the term; they owe nothing to the public, and are the mere private servants of the Convention. It was therefore within the power of the Convention to make such regulation as to the endurance of the office, or its emoluments, as they might judge proper. Even if the respondents did hold a public office of such a nature as ought to be permanent, the Courts had not gone the length of finding that they would be entitled to hold it for life, or until fault proved, but only that they should not be dismissible unless upon reasonable ground. It is sufficient, therefore, to shew a reasonable cause why their salaries should be reduced. Previous to the reform act, the duties of clerk to the Convention were all but nominal, and such as they were, they were still farther reduced by that statute. The act of the Convention in 1815, increasing the salary, was not expressed for all time coming, and that act, and the other in 1713, shew that the Convention has been in use to regulate the salary according to the duty to be performed, and there is no allegation that the reduction of salary complained of was made fraudulently to defeat in substance the right to the office.

Mr Attorney-General and Mr Maconochie for the respondents. — I. The Convention of Burghs is an aggregate corporation, consisting of delegates from all the individual burghs, and created by statute for the performance of important public functions. Although in its creation it may not expressly be constituted a corporation, or be entitled to that character in respect of

its composition, by the law of Scotland it is not necessary that there should be either charter or statute to give the right to act as a corporation. The Dean of the Faculty of Advocates may sue as such, and so may the General Assembly of the Church.

[*Lord Chancellor.* — Where are the instances of the General Assembly suing?]

Robertson *v.* General Assembly, 11 *S.* and *D.* p. 297, is an instance of an action against the Assembly; and Presbyteries, if not Synods, have maintained actions, though they certainly are not corporations. The Attorney-General also in this country may maintain a suit begun by his predecessor, though he is not a corporation.

[*Lord Cottenham.* — He is exercising the prerogative of the Crown.]

The Convention is at all events an important body politic, exercising public functions, judicial as well as ministerial acts, 1487, cap. 3, and 1578, cap. 64. When grants were wont to be made by Parliament to the Sovereign, a *cumulo* sum was laid upon the burghs, which was allocated upon them by the Convention, and to this day the Convention allocates the proportion of the land tax to be borne by the individual burghs. The powers of the Convention were confirmed by the act 1581, cap. 119, which directed that letters of horning should proceed against the absenting burghs on the certificate of the clerk of the Convention; the act 1607, cap. 6, also authorizes the same diligence on the acts and decreets of the Convention, betwixt burgh and burgh, and burgesses; and *M'Kenzie*, in his observations on the act 1581, cap. 119, says, that by an unprinted act in 1607, execution is to pass at the instance of the agent of the burghs. In the Royal Burghs *v.* Burgh of Selkirk, 3 *Brown's Supp.* 410, the Courts recognized the right of the Convention to appear in a corporate capacity, and in the records of the Convention there are many instances of similar proceedings. The present defence

and this appeal admit the existence of the body for the purposes of the action, otherwise why are they maintained, and the action not allowed to work out its own cure. But the permanent existence of the body is shewn by its permanent establishment of office-bearers, its common agent or procurator-fiscal, and clerks, none of whom has been appointed by every Convention, but has enjoyed his office perennially. To deny the existence of the body is merely to confound its existence with the meetings of its members. And even if the body did not exist, that will not affect the right of the respondents to their office, as is shewn in the case of the clerks of the House of Commons, who retain their offices notwithstanding the dissolution of Parliament.

II. The officers of a body of the public corporate character of the Convention, must be considered as public officers; and as to these it has in several cases been found, that the clerks of individual burghs hold their offices *ad vitam aut culpam*, independent of the terms of their appointment, Mags. of Forfar *v.* Adam, 1 *S.* and *D.* 458; Simpson *v.* Tod, 3 *S.* and *D.* 150; Farish *v.* Mags. of Annan, 15 *S.* and *D.* 107. So in the case of the clerk of the general kirk-sessions of Glasgow, it was found, that he held his office for life, Harvie *v.* Bogle, *Mor.* 13126. Independently of this, the appointment of Cunninghame, in conjunction with Gray, gave Gray the fees for his life, and the benefit of survivorship to the longest liver; the grant is therefore for life to the two, by necessary implication. And with respect to the usage in regard to this particular office, Thomson's removal was for cause shewn, and with the exception of one or two instances after this, all the appointments imported a duration for life, and there is no instance of a removal at pleasure.

III. If the respondents held their offices for life, it is not within the power of the appellants to interfere indirectly with

their enjoyment of them by any reduction of the salary; a power to reduce the salary necessarily involves a power to deprive of the office, and it is somewhat surprising that an appeal should be brought to assert so extravagant a power.

[*Lord Brougham.* — I am not surprised when I see what the Court has done as to the last conclusion of the summons.

Lord Cottenham. — So that the Convention cannot add to the duties of the clerks without their consent?]

This is an objection which comes by surprise, as it was not argued in the Court below, but it is susceptible of an answer. If the duties of the office increase, the clerks must of course submit, but the conclusion referred to applies to an addition, not an increase of duties.

[*Lord Campbell.* — You say the Convention may add to their labours, not their duties.]

Exactly so. The raising of the salary was equivalent to a new appointment, and though, when another appointment takes place, the Convention, if the office be not public and held for life, may be entitled to reduce the salary if they please, they cannot till then.

[*Lord Campbell.* — So far as salary is concerned, you rest on contract.]

Yes. As regards Mr Bell at least when he was appointed; the salary complained of was in existence.

[*Lord Campbell.* — What evidence is there of immemorial salary?]

There is no evidence certainly of that, but there is that the salary was L.25 to each from 1715. However, we put it on contract in either case, and say, that the Convention had no right to reduce the salary on any ground.

LORD BROUGHAM. — This was an action of reduction and declarator brought by the respondents to set aside a resolution of

the appellants, reducing their salary as clerks of the Convention, and to have it declared that they held their office for life, and that the Convention had no power to increase or change their duties, any more than to alter their salaries. Mr Cunningham had been appointed in 1808, with Mr John Gray, to be together conjunct clerk with Mr John Dundas, "with benefit of survivor-"ship," and "with survivancy to the longest liver of them," (Cunningham and Gray.) There was added the very usual clause, giving them the office "as freely and fully as any of their "predecessors had held it;" and farther, the emoluments were declared to belong "to Gray during his natural life." In 1816, Mr Bell was appointed to succeed Mr Dundas, and to hold the office "as fully and freely as Dundas or any of his predecessors "could have done."

The salary was raised in 1815. Having for above forty years before been L.25 for each clerk, it was now doubled; that is, when Cunningham was elected, the salary was L.25, when Bell was elected it had become L.50; and the interlocutors appealed from declare, not only that the Convention had no right to lower Mr Cunningham's original salary, but that they had no right to take off the addition, which had been made in 1815, from him any more than from Mr Bell, who had been elected after that increase. So that, according to this decision, if any addition should ever on any account be made to the salary of the office, as in respect of additional trouble, this addition could never be taken off, even if the trouble entirely ceased which occasioned it.

Such a position seems to be wholly untenable. Accordingly, the Lord Ordinary plainly gives his opinion, that there is a great difference between the salary added in 1815, and the former salary; and he holds this difference to exist in Bell's case as well as in Cunningham's, not deeming it a matter of contest between Bell and those who appointed him, but regarding the question as

turning upon the right of both to the office and its emoluments as fixed by the ancient usage and enjoyment of the office.

The Convention is a body authorized and regulated, though it might not be created by the statute of James III. (1487) chapter 111, and it is appointed to meet yearly on the morrow of Saint James. It consists of commissioners or delegates from the royal burghs, and has the regulation of matters of trade within a narrow sphere, compared to what it formerly had. The meeting of the Convention seems never to have continued above three days, and of late years never above two. At each meeting it is not adjourned or prorogued, but dissolved, though a very few instances are to be found of intermediate proceedings. The business is very little in point of labour or importance; and the trouble of the clerks is proportionately small.

A body so chosen, and of a kind so peculiar, can with difficulty be compared to a corporation, and it is with difficulty that we can arrive at the conclusion that it should have the power of conferring an interest for life on any of its officers. The House of Commons, to which it has been compared in argument, and in order to shew that a representative body may have officers whose tenure depends not on its own existence, can hardly be considered as affording an appropriate example; for certainly no officer chosen by the House has any existence beyond a dissolution. The clerks are appointed by the Crown, the Speaker is chosen by the House, but chosen each Parliament.

However, it is unnecessary to inquire whether or not a body such as the Convention may or may not appoint to offices for life. A long and clear usage may possibly shew that this power exists, and that the office-bearer chosen by a body of delegates, who are themselves only called into existence for two days once a-year, and at the expiration of these two days cease to exist, hold their places for their own lives. It is conceivable, though barely conceivable, that the whole burghs being corporations of

continued existence, this Convention of their delegates may be an incident to the corporate existence of the several individual burghs, or may be something growing out of that corporate existence, and may have the power in question. Such an anomalous thing may perhaps be conceived. But at least it must be admitted, that clear proof of this by long usage must be given, else the probability is, that such a body only chooses its officers occasionally, or at least continues them from meeting to meeting as long as it pleases, and though it may not each time elect them anew, the likelihood is, that the former nomination is assumed to continue as if a new one had taken place, until there be a new appointment.

But this question does not necessarily arise here. At least the main question meant to be raised as to the right of lowering the salary, may be disposed of without determining whether the clerks are removeable or not; and the clerks may be removeable by declarator without being liable to dismissal at the mere caprice of the Convention. As, however, there is a declaratory conclusion in the summons that the offices are for life, and as the Court has found in terms of that conclusion, we must observe, that there seems really no sufficient ground for holding that the office is a life interest. The usage seems to be the other way.

In 1664, William Thomson is appointed "during their "pleasure." In 1666, they remove him for neglect of duty, reciting that he held his office "during their pleasure allenarly, "and that they could declare the place vacant as often as they "found it meet and expedient for their affairs." Thomson had been removed from his other office of town clerk of Edinburgh, and he resisted this removal successfully in the Court of Session. But he acquiesced in the dismissal from the place of clerk of the Convention.

Young, the successor of Thomson, was elected in like manner

during pleasure, and held the office till 1669, when Roughead was chosen in the same terms.

There are no instances of any other appointment produced until we come to that of Mr Dundas, which is assumed by the Lord Ordinary to have been for life; but the papers do not in any one part afford any thing like precise evidence of what Mr Dundas's appointment was. The only reason for supposing that he had been appointed for life is to be found in the expression, "with benefit of survivorship," which occurs in Mr Cunningham's appointment; but this is quite inconclusive, for it may only mean, that Gray and Cunningham shall, while Dundas lives, be together joint-clerk with him, and that after his decease they shall be the two clerks without any successor being appointed to Dundas. Such a clause was quite consistent with none of the three holding for his own life. It is said that Bell was to hold the office on the same terms with Dundas. This construction of the gift made it of primary importance to ascertain the tenure of Dundas. But this is not done, otherwise than by referring to the equivocal clause of survivorship. But it is by no means clear that the words imply the identity of the tenure. They rather relate to the exercise of the office. He (Bell) "is to exercise the said "office as fully and freely in all respects as John Dundas could "have done, or which by law and custom appertains to the "office of conjunct clerk." There is evidently here not an elliptical expression, but apparently an omission of certain words, for it says, "to exercise the said office as freely and fully in all "respects as John Dundas could have done," and it must mean, "and to do things, or to receive emoluments, or to hold "rights which by law and custom appertain to the office of con-"junct clerk."

The clause respecting John Gray has also been much relied upon, but is liable to the observation made respecting the clause of survivorship. Indeed it is, when rightly considered, a pro-

vision for survivorship. John Gray was in the office. It was not intended to remove him, but only to add Cunningham to him as joint conjunct clerk, in such manner that they two should be one clerk, with John Dundas as the other, and that whichever of the two outlived the other, should be the sole colleague of John Dundas. But the whole emoluments of this conjunct clerk were to be John Gray's. In other words, he was an elderly man, and Mr Cunningham was to be his successor, leaving the fees to him, John Gray, for his life. That is, the Convention had no intention of removing him while he lived. But if this clause were held to give John Gray a life interest, which he had not before, (a very erroneous construction,) or to prove that he had before a life interest, it shews nothing as to Cunningham; nay, it rather would exclude his claim to such an interest.

The claim of survivorship between him and Gray plainly proves nothing. But for that clause Cunningham's office would have ceased upon John Gray's death. It was only meant to continue him notwithstanding John Gray's decease.

It is not to be denied that the leaning of the Scotch law is towards affirming the interest of office-bearers in their offices, preventing summary ejectments, without proceeding to declare the places vacant, and rather taking hold of circumstances to shew that the party is not removable without fault. Nevertheless, there must be something to shew that an office, which in its own nature appears to be one held during pleasure, is given for life. Where a body exists in the way we find this Convention constituted, a yearly meeting for two, or at most three days, of persons chosen only to attend such meeting, and then to cease holding any functions, falling back, as it were, into the several bodies which had deputed them for the special occasion, the last thing we naturally expect is, that such a meeting should appoint office-bearers for life. Nothing but a continued course of pro-

ceeding can make us suppose that such is the nature of the office, and in this case that course appears to be wholly wanting.

Reference has been made to cases for the purpose of shewing that such offices must be for life, or it is possible it is only meant that they are for life unless the contrary be proved. These cases certainly prove nothing of the kind. What is laid down in the case of town clerks seems to proceed upon the nature of the office which the Court of Session has held to require a tenure other than during pleasure.

The strongest case is that of Simpson *v.* Tod, 3 Shaw and Dunlop, in which the Court said that the public duties of the office were important, and required the holder "to be under no "apprehension of being liable to dismissal at the pleasure, per- "haps at the caprice, of the Town Council," and hence they rejected the words "during pleasure" in the appointment, as incompatible with the nature of the office. It is singular that the much higher office of Judge in the Supreme Court should, in the same country, have been held always during pleasure, even after it had ceased, and only ceased by statute, to be so holden in England.

But when the case of Annan *v.* Farish, in 2 *Sh.* and *M'L.* 930, came before this House by appeal, the judgment of the Court below, which proceeded only on the possessory question, was affirmed, with an alteration expressly made to shew that no opinion whatever was pronounced upon the tenure of the office. Indeed that judgment below, although containing words liable to misconstruction, and which were therefore struck out here, had also an express reservation of any right which the appellants might have to bring an action of reduction for setting aside the appointment.

When the respondents, in the present case, rely on prescription, they must rather mean something analogous to prescription, such as long usage. For certainly it is not easy to see how the

emoluments of an office, held by personal election or nomination, can be the ground of prescription. In all the cases to which reference is made, either in this discussion, or by text writers, who mention fees of office as capable of prescription, the offices appear to be of an hereditary description, and so feudalized, or *quasi* feudalized, as almost all offices, and indeed almost every thing else became, in process of time, all over Europe, under the feudal system.

Thus the cases cited by *Erskine* to prove this position, Sheriff of Galloway *v.* Cassilis, 11th March, 1634, Douglas *v.* Jedburgh, 18th July, 1660, and Calendar *v.* Stirling, 11th July, 1672, were the cases of heritable sheriffs, and the first of them was a question respecting a servitude claimed in right of a landed estate, possessed with the servitude time out of mind; so too Cunningham *v.* Eglinton, 27th December, 1709, was the case of heritable sheriff of Renfrewshire, of which the grant being "cum feodis, "&c." the Court held "sufficient to ground a prescription." Kinghorn *v.* Forfar, 18th July, 1676, was the case of an heritable constable; Murray *v.* Ness, 13th December, 1677, was the case of an heritable sheriff; and Hatter *v.* Dundee, 9th December, 1679, was a question between an heritable constable and a corporate town. No one can doubt, that owners of such property may validly prescribe for the emoluments belonging to it.

That a body like the Convention, by continuing to pay, not to one clerk, but to successive clerks, for forty years, a certain salary, thereby gives, not to one individual, but to every clerk who may ever after be employed, a prescriptive title to the same salary, appears to be a proposition neither consistent with the nature of such an office, nor of title by prescription.

The judgment below, therefore, appears to me, according to the best opinion I have been able to form upon this subject, to which I have certainly paid considerable attention, unsupported by the facts of the case, and irreconcileable with any legal

principle; and I should recommend to your Lordships that it be reversed, and that the appellants (the defenders below) be assoilzied from the conclusions of the summons, with the costs below.

Lord Cottenham. — My Lords, I entirely concur in opinion with my noble and learned friend. The interlocutor appealed from is according to the conclusion of the summons. It therefore declares void the order of the Convention for reducing the salaries of the clerks. It declares that it is *ultra vires* of the Convention to add to the duties of the clerks, or to reduce their salaries of L.100 per annum between them. And it declares that the clerks have a vested life interest in their office, and in the fees, salaries, and emoluments thereof, and that each of them is entitled to a salary of L.50 for each succeeding year of his life.

Before adverting to the debateable grounds of the appeal, I cannot but observe, that it is only since the 11th of July, 1815, that the salary has been of the present amount, when it was raised from L.25 to L.50, by the voluntary act of the Convention, at which sum it has since been continued by the annual vote, and that the only act adding to the duties of the clerks is that of the 15th of July, 1824, which abolished the office of recorder, and threw the duties of it upon the clerks, in which they have ever since acquiesced, and they do not, by the present action, seek to be relieved from the effect of that order.

The pursuers have attempted to support their case, and the interlocutor appealed from, by insisting, *First*, That the General Convention of the Royal Burghs of Scotland is a corporation. *Secondly*, That their office of clerk is an office for life. And, *Thirdly*, That the salary is attached to, and constitutes part of the office, and therefore is held for life also.

Another point was raised at the bar, namely, that the pursuers were entitled by contract to the salary of L.100 per annum.

But this I put out of the subject matter for consideration, because there is neither any allegation in the summons, nor any proof to support that proposition. I proceed, therefore, to consider the above three points.

If the pursuers should be found to have failed in any of these three points, their whole case must fail; I think they have failed in all three. But having formed a very decided opinion upon the two last, I abstain from putting my decision upon the first.

The term "corporation" is certainly used in a much more extended sense in Scotland than in this country; possibly, therefore, the term may, consistently with usage in other cases, be applied to the Convention; but when a question arises as to the powers and liabilities of the body, which must depend upon its continued existence, and other qualities incident to a complete corporation, the nature and qualities of the body, and not the term by which, in the looseness of language, it may have been designated, ought to be the subject of inquiry. In such a case, the term "*quasi* corporation" is much too indefinite to found any conclusion upon.

If it were necessary to give a decided opinion upon the first point, it would be to be considered, how a body of men, appointed for a particular purpose, and whose meeting is declared to be dissolved when that purpose is effected, can be considered as a corporation in that sense, which is necessary to enable them to bind by contract those who may in a subsequent year be appointed for a similar purpose.

The second point, whether the office of clerk be an office for life, unless decided by a negative of the first proposition, must be matter of evidence applicable to the particular office; for no aid can be derived from decisions, that town-clerks and other officers, having recognized public duties to perform, have a freehold in their office.

From the offices held by the pursuers they must be supposed

to have access to all the evidence capable of being produced upon this subject; but they have not produced any one instance of a grant of the office for life. All the instances that have been produced (and some are of an early period) are expressed to be "during pleasure," or "as fully and freely in every respect as "any of their predecessors could or might have done, or which "to the office by law or custom does appertain," which appears to have been the more modern form, and which, by referring to the former appointments which were during pleasure, must have the same construction as if those words had been used instead of being adopted by the reference.

The appointment of 1808, under which Mr Cunningham holds the office, was said to be an exception, and it was argued that it amounted to a grant to him of the office for life. I think it is plain that this is not the true construction of the appointment. The object was to secure to Mr Gray, the old clerk, the emoluments of the office, and to procure for him the assistance of Mr Cunningham, who, in consideration for such unpaid assistance, was to succeed Mr Gray. The two, therefore, were appointed in the usual form, that is, to hold the office as fully and freely as their predecessors, that is, during pleasure, with survivancy to the longest liver of them, which was necessary to continue the office to Mr Cunningham after Mr Gray's death. And then, in order to carry the arrangement between the parties into effect, the fees, salaries, and emoluments belonging to the office were granted to Mr Gray during his natural life. This could not affect the nature of the office, but was introduced only to provide that Mr Cunningham should not receive any of the emoluments of the office so long as Mr Gray lived; and at most, it regarded only Mr Gray, and had no reference to the appointment of Mr Cunningham. It appears to me, therefore, that the second proposition, that the office was for life, is not only not

established, but that the evidence proves, that it has at all times been an office during pleasure only.

But, thirdly, supposing the office to be for life, the pursuers had to prove that the salary in question was incident to the office. The question is not one of fees or perquisites, but of annual salary, which was raised from L.50 to L.100, in 1815, and which had been regulated by an act of the Convention in 1713. Before that time, the emoluments of the clerk were L.40, ordinary salary, and L.20 gratuity, and in that year the Convention directed their agent to pay L.50 salary for the future, in lieu of all gratuity; and the salary, so varied from time to time, and contended to be part of, or incident to the office, appears, upon investigating the proceedings of the Convention, to be the subject of an annual vote of the Convention, who annually continue the tax-roll and establishment to the following year.

The Convention having no property wherewith to pay their necessary expenses, what is so annually voted is raised by an assessment upon the different burghs; and if it were necessary to pursue the case so far, it would be difficult for the pursuers to shew how the right to which they are declared entitled by the interlocutor appealed from could be enforced, which is, in many cases, no bad mode of trying the validity of an alleged right. It is, however, sufficient for the present purpose to say, that it appears to me that the right of the clerk to the salary exists only in the vote, and does not extend beyond the period embraced in the vote.

For these reasons, it appears to me, that the pursuers have failed in the grounds upon which their case depended, and that the interlocutors appealed from ought to be reversed, and the defenders assoilzied from the conclusion of the libel, with expenses.

Lord Campbell. — My Lords, I am extremely sorry, that, in this case, I cannot agree with my noble and learned friends who

have preceded me. I do not think that the interlocutor of the First Division of the Court of Session can be supported to its full extent; but I cannot concur in the proposed judgment, simply to reverse that interlocutor, with a decerniture that the defenders should be assoilzied from all the conclusions of the libels in the original and supplemental actions, the consequence of which would be, that the pursuers may at any time be dismissed from the office they hold, or that their salary may be reduced to a nominal amount.

In the first place, I can entertain no doubt, that, by the law of Scotland, the Convention of Royal Burghs is a corporation capable of appointing officers, and of suing and being sued. This body has existed from the most remote times, it has very important functions in the regulation of trade — it has the power of taxation, and although, of late years, it has only sat for two or three days in a year, there is no reason why it might not sit throughout the year, or at any periods when occasion might require. It therefore seems to me to be very much in the nature of the Municipal Corporations, with which we are so familiar. As to its being capable of suing and being sued, there are repeated instances of its having brought actions, and of actions having been brought against it, without its power of suing and being sued ever having been called in question.

Secondly, It is proved that the office of clerk has existed as an office under the Corporation from the remotest times, with fees and emoluments belonging to it. It is not disputed that the pursuers were duly appointed to this office; but a great question arises as to their tenure of this office. My opinion, formed after the best consideration I have been able to bestow upon the subject, is, that they hold it *ad vitam aut culpam*. I do not by any means yield to the argument, that, from the nature of the office, it must necessarily be held for life, or during good behaviour. I do not think that the authorities shew, that before the Scotch

Municipal Corporations Act, the town-clerk of a burgh could not, in any case, be appointed yearly, or during pleasure; and if there had been such a rule applicable to the town-clerk of a burgh, it would not necessarily extend to this office under the Convention of Royal Burghs. I look to the manner in which this office has been held, and particularly to the appointment of the pursuers.

Three instances appear in the 17th century, in which the appointment was expressly during pleasure. Most of the other appointments appear to have been general, with power to exercise the office as fully as the predecessors of the party appointed had done, and with all fees, salaries, and emoluments, belonging to the office. Under such appointments the clerks have enjoyed the office for life, and in the case cited, of the removal of Sir William Thompson, although misconduct was alleged, the order removing him begins in these words:—"The royal burrowes "met in a General Convention, taking to their serious conside- "ration, that Sir William Thomson was elected clerk to the "said Convention during their pleasure allenarlie, and that "thereby it is in their power to declare the said place vacant so "often as they shall find it meet and expedient for their service "and affairs." The reason assigned for their being able to declare the office vacant is, that he was appointed "during their "pleasure allenarlie." I think the fair inference is, that although the Convention might appoint a clerk "during pleasure allen- "arlie" if they chose, a general appointment by them was to be construed an appointment for life.

But Mr Cunningham's appointment I consider for life by express words. On the 13th of July, 1808, an appointment was made in the following terms:—"There was read a resignation "from Mr John Grey, writer to the signet, conjunct town- "clerk of Edinburgh, of his office of conjunct clerk to the "General Convention, agreeable to what he intimated yester-

" day, and the same having been accepted of, the preses moved " that Mr John Gray, and Mr Charles Cunningham, writer " to the signet, conjunct town-clerk of Edinburgh, be elected " into the office of conjunct clerk to the Convention, along with " John Dundas, writer to the signet, with the benefit of sur- " vivorship; which motion having been seconded by the Com- " missioner for Perth, and the roll having been called, and the " votes marked, it carried approve, by a majority of twenty- " six to eight. Whereupon the said John Gray, and the said " Charles Cunningham were duly elected into the office of con- " junct clerk to the General Convention of the Royal Burghs, " along with the said John Dundas, with survivancy to the " longest liver of them, the said John Gray and Charles " Cunningham; and the Convention granted, and hereby grant " power to them, or either of them, to exercise the said office as " fully and freely, in every respect, as any of their predecessors " could or might have done, or which to the office of conjunct " clerk to the Royal Burghs of Scotland by law or custom does " appertain; giving and hereby granting to the said John Gray, " the fees, salaries, and emoluments belonging to the said office, " during his natural life. Whereupon the said John Gray and " Charles Cunningham accepted of the said office, and gave " their oath *de fideli administratione*, and qualified to govern- " ment by taking the oath of allegiance, and signing the same " with the assurance."

Gray was appointed with all fees, &c., during his natural life. How he should be entitled to receive the fees during his natural life, unless he was appointed during his natural life, I confess I do not understand. Gray being appointed during his natural life, Cunningham, the conjunct clerk, was appointed along with him, " with benefit of survivorship," and " survivancy to the longest " liver of them, the said John Gray and Charles Cunningham."

I hardly know what language could more strongly have expressed the intention to appoint both for life, and it does seem strange to me to suppose that Cunningham could have been discharged during the life of Gray; and still more so, that if he held during the life of Gray, he might be discharged upon his death, which hardly seems consistent with benefit of survivorship.

The appointment of the pursuer Bell took place on the 9th of July, 1816, and is thus recorded,—"The Prèses acquainted "the Convention that a vacancy in the office of conjunct prin- "cipal clerk to the Royal Burghs had taken place, in conse- "quence of the decease of Mr John Dundas. The Commissioner "for Glasgow then proposed that Mr Carlyle Bell, writer to "the signet, and one of the conjunct town clerks of Edinburgh, "should be elected to fill the vacancy; which having been "seconded by the Commissioner for Aberdeen, the said Carlyle "Bell was unanimously elected into the said office; and the "Convention granted, and hereby grant, full power to him to "exercise the said office as fully and freely in all respects as the "said John Dundas, or any of his predecessors could have done, "or which by law and custom appertains to the office of con- "junct clerk to the General Convention of the Royal Burghs of "Scotland; giving and granting to the said Carlyle Bell the "whole fees, salaries, and emoluments belonging to the said "office. And the said Carlyle Bell being present, accepted of "the said office, and having been sworn *de fideli*, he qualified to "government by taking the oath of allegiance, and signing the "same with the assurance."

Here, while Cunningham held the office of conjunct clerk for life, Bell is appointed as his colleague, "to exercise the said office "as fully and freely in all respects as John Dundas or any of his "predecessors could have done, or which by law or custom "appertains to the office of conjunct clerk to the General Con- "vention of the Royal Burghs of Scotland." John Dundas

does not appear to have been expressly appointed for life; but John Gray had been expressly appointed for life, and John Gray was one of the predecessors of Cunningham.

For these reasons I think that both the pursuers were appointed *ad vitam aut culpam.*

But it is said under the defenders' third plea in law, that the members of the Convention are fluctuating, that they are elected only for a short period, and that they cannot bind their successors by any such appointment.

I do not consider, my Lords, that there is the slightest weight in this objection, which was so much relied upon in the Court below. The individual members of the corporation are fluctuating, and are elected for a short period of time; but the corporation itself, the *ens legis*, is perpetual, and the lawful acts which it does are binding upon it, when the individuals through whose instrumentality the acts were done have ceased to be members. A municipal corporation would lose none of its powers or attributes, although by its constitution all the members of the corporation should be elected for one year only.

If the pursuers have a freehold in their office, it follows that they cannot be deprived of the just emoluments of it, any more than be arbitrarily dismissed from it. Now, I consider L.50 a year to the two jointly as the just emoluments of the office. A salary to this amount in lieu of fees and perquisites had been received by the conjunct clerks for a period of time much longer than is necessary to give a prescriptive right by the law of Scotland before 1815. It was then raised to L.100 a-year. But I do not think that the Convention were precluded from again lowering it at their discretion to the ancient amount, if they thought that this was just, from a diminution of the business to be done, or any change in the times.

The consequence would be, that the order of 1834, reducing the salary of Messrs Cunningham and Bell, for discharging the

office of principal clerk to the Convention, to L.50, is valid, and ought not to be disturbed; but that the order of 1835, reducing the salary to L.35 a-year, is *ultra vires*, and should be declared void.

This is the view of the case taken by Lord Cunninghame, Ordinary, with whom I entirely concur. But the First Division of the Court have gone much farther, and "decerned and "declared in terms of the original and supplemental libels;" the conclusions being that both orders should be rescinded, and that it should be declared to be *ultra vires* of the Convention to add to the duties of the pursuers without their consent, and that they were entitled to hold for life at a salary of L.100 a-year.

I think the Convention cannot change the nature of the office; but it is possible that new duties as conjunct clerks might lawfully be cast upon them.

My humble advice to your Lordships, therefore, would have been to have altered the interlocutor of the First Division; but I cannot wish that your Lordships should not be guided by the advice of my noble and learned friends, who are so much more competent to come to a right conclusion; and I presume therefore, that the interlocutor must be reversed, with an absolvitor to the defenders on all the conclusions of the libels.

Lord Brougham. — My Lords, I take for granted, that although my noble and learned friend differs from us on one part of the case, there will be no difference of opinion as to the costs; but that if we reverse the interlocutor, and assoilzie the defenders, they ought to have the costs below; not the costs here, but the costs below.

Lord Campbell. — Clearly.

Ordered and Adjudged, That the interlocutors complained of in the appeal be reversed, and that the defenders in the action to which the appeal relates be assoilzied from the conclusions of the summons:

And it is farther Ordered, That the pursuers in the said action do pay, or cause to be paid, to the defenders in such action the costs of the proceedings in the Court of Session: And it is also farther Ordered, That the cause be remitted back to the Court of Session in Scotland, to do farther therein as shall be just and consistent with this judgment.

RICHARDSON & CONNELL — SPOTTISWOODE & ROBERTSON, Agents.

(Heard *7th*, *8th*, and *11th July*. — Judgment *11th July*, 1842.)

THE REVEREND JOHN FERGUSON, Minister of Monivaird, and Others, *Appellants*.

THE RIGHT HONOURABLE THOMAS ROBERT, Earl of Kinnoul, and the REVEREND ROBERT YOUNG, Preacher of the Gospel, Presentee to the Church and Parish of Auchterarder, *Respondents*.

Courts. — *Public Officer.* — Courts or public officers having a ministerial duty to perform, are liable to action for refusal to enter upon the performance.

Church. — The members of a Presbytery are liable in damages for refusal to take a presentee to a church upon trial.

Corporation. — The individual members composing the majority of a corporation authorizing an illegal act, are liable in damages for so doing.

THE respondent the Earl of Kinnoul, as heritable proprietor of the right of patronage of the church and parish of Auchterarder, and the respondent Robert Young, preacher of the Gospel, presentee to the said church and parish, brought an action setting forth, That the church and parish of Auchterarder having become vacant on the 31st of August, 1834, the Earl of Kinnoul, in September, 1834, issued a deed of presentation in favour of the respondent Young, "nominating and presenting "him to be minister of the said church and parish of Auch- "terarder, during all the days of his lifetime; and giving, "granting, and disponing to him, the constant localled and "modified stipend, with the manse and glebe, and other profits "and emoluments pertaining and belonging to the said church

" and parish, for crop and year 1835, and during his lifetime, " and his serving the cure of the said church; requiring thereby " the Reverend the Moderator, and the Presbytery of Auch- " terarder, to take trial of the qualifications, literature, good life " and conversation of the said Robert Young, pursuer; and after " having found him fit and qualified for the functions of the " ministry of the said church of Auchterarder, to admit and " receive him thereto, and give him his act of ordination and " admission in due and competent form." That at a meeting of Presbytery, which was held on the 14th day of October, 1834, the deed of presentation, together with a certificate of the patron's having qualified to Government, the presentee's letter of acceptance of said presentation, certificate of his having qualified to Government, parochial certificate, and a certificate signed by five ministers of Dundee, that the presentee was a licentiate of the Presbytery of Dundee, with an engagement to produce an extract of his license so soon as a meeting of the Presbytery of Dundee should be held, were all given in and read, and appointed to lie on the table of the Presbytery until their next meeting. That at the next meeting of the Presbytery, which was held on the 27th October, 1834, there was produced an extract of the license of the respondent Young, as a preacher of the Gospel, and testimonial in his favour by the Presbytery of Dundee, whereby they " testify and declare, that Mr Robert Young has frequently " preached within their bounds with acceptance, and that his " conduct, as far as known to them, has been uniform, pious, " grave, and exemplary, as became a preacher of the Gospel, " and one whose views are directed to the holy ministry, so that " they can, and by these presents do, respectfully recommend " him to the attention of any Presbytery or Christian people " where Providence may order his lot, for all due and suitable " acceptance and encouragement from them;" all which documents having been read, the minutes of the Presbytery of

Auchterarder bore, "that all the documents usually given in in "cases of this kind, having already been laid on the table, along "with the presentation in favour of the Reverend Robert Young, "to be minister of the church and parish of Auchterarder, the "Presbytery did so far sustain the presentation as to find themselves prepared to appoint a day for moderating in a call to "Mr Young to be minister of that church and parish." That after certain procedure, the Presbytery, at a meeting held on the 7th of July, 1835, did, on the sole ground that a majority of the male heads of families, communicants in the parish of Auchterarder, had dissented, without any reason assigned, from his admission as minister, refuse to take trial of the qualifications of the said Robert Young, and did then reject him as presentee to the church and parish of Auchterarder, so far as regarded the particular presentation in his favour, and the occasion of the vacancy in the parish; and intimation of the determination was directed to be forthwith given to the patron and presentee, which was done accordingly. That the respondents, as patron and presentee respectively, thereupon instituted a process against the Presbytery of Auchterarder, and Mr John Ferguson, minister of Monivaird; Mr James Thomson, minister of Muckart; Mr John Brown, minister of Glendovan; Mr John Clark, minister of Blackford; Mr William Stodart, minister of Maderty; Mr Peter Brydie, minister of Fossaway; Mr William Mackenzie, minister of Comrie; Mr William Laing, minister of Crieff; Mr Alexander Laird, minister of Ardoch; Mr Samuel Cameron, minister of Monzie; Mr Thomas Young, minister of Gask; Mr James Walker, minister of Muthill; Mr Alexander Maxtone, minister of Fowlis; and Dr James Russell, minister of Dunning, the individual members thereof, to have it declared, "That the pursuer, the said Robert Young, "has been legally, validly, and effectually presented to the "church and parish of Auchterarder: That the Presbytery of

" Auchterarder, and the individual members thereof, as the " only legal and competent court to that effect by law consti- " tuted, were bound and astricted to make trial of the qualifica- " tions of the pursuer, and are still bound so to do; and if, in " their judgment, after due trial and examination, the pursuer " is found qualified, the said Presbytery are bound and astricted " to receive and admit the pursuer as minister of the church and " parish of Auchterarder, according to law: That the rejection " of the pursuer by the said Presbytery, as presentee foresaid, " without making trial of his qualifications in competent and legal " form, and without any objections having been stated to his " qualifications, or against his admission as minister of the church " and parish of Auchterarder, and expressly on the ground that " the said Presbytery cannot, and ought not to do so, in respect " of a *veto* of the parishioners, was illegal, and injurious to the " patrimonial rights of the pursuer, and contrary to the provi- " sions of the statutes and laws libelled." That in this action, on the 8th of March, 1838, the following judgment was pronounced: — " The Lords of the First Division having considered " the Cases for the Earl of Kinnoul and the Reverend Robert " Young, and for the Presbytery of Auchterarder, with the " record and productions, and additional plea in defence ad- " mitted to the record, and heard counsel for the said parties at " great length in presence of the Judges of the Second Division " and Lords Ordinary; and having heard the opinions of the " said Judges, they, in terms of the opinions of the majority " of the Judges, repel the objections to the jurisdiction of the " Court, and to the competency of this action as directed against " the Presbytery: Farther, repel the plea in defence of acqui- " escence: Find, that the Earl of Kinnoul has legally, validly, " and effectually exercised his right as patron of the church and " parish of Auchterarder, by presenting the pursuer, the said " Robert Young, to the said church and parish: Find, that the

" defenders, the Presbytery of Auchterarder, did refuse, and " continue to refuse, to take trial of the qualifications of the " said Robert Young, and have rejected him as presentee to " the said church and parish, on the sole ground (as they admit " on the record) that a majority of the male heads of families, " communicants in the said parish, have dissented, without any " reason assigned, from his admission as minister: Find that the " said Presbytery in so doing have acted to the hurt and preju- " dice of the said pursuers, illegally, and in violation of their " duty, and contrary to the provisions of certain statutes libelled " on; and in particular, contrary to the provisions of the statute " of 10th Anne, cap. 12, intituled, 'An act to restore patrons " 'to their ancient rights of presenting ministers to the churches " 'vacant in that part of Great Britain called Scotland;' in so " far repel the defence stated on the part of the Presbytery, and " decern and declare accordingly, and allow the above decree to " go out and be extracted as an interim decree; and with these " findings and declarations, remit the process to the Lord Ordi- " nary to proceed therein as he shall see just." That on the 3d April, 1838, a memorial was presented to the Presbytery by the respondents, as patron and presentee, setting forth the decree pronounced by the Court, and requiring the members of Presbytery "to repair so far the injury decreed to have " been done, by taking the said Robert Young on trials, and " thereafter proceeding in his settlement as minister of the " said church, without any farther delay;" nevertheless, they refused to make trial of the qualifications of the said Robert Young, and to proceed in his settlement as aforesaid; and therefore the respondents, for their respective interests, as patron, and presentee, protested that the Presbytery, and the individual members thereof, should be, conjunctly and severally, liable for all loss, skaith, injury, and damage, done, or to be done, or occasioned to the respondents, or either of them, by or through

such refusal or delay: That the Presbytery of Auchterarder, and individual members thereof, having referred the memorial presented by the respondent to them as aforesaid, to the Synod of Perth and Stirling, the same was referred by the Synod to the General Assembly, by whom the following deliverance was pronounced: "The General Assembly sustain the references, "approve of the conduct of the Presbytery of Auchterarder, and "the Synod of Perth and Stirling; authorize the procurator for "the Church to appeal the judgment of the Court of Session, "in the action at the instance of the Earl of Kinnoul and the "Reverend Robert Young, against the said Presbytery, so soon "as he and the other counsel for the Presbytery in the said cause "shall think it expedient to do so: Find, that it is not expedient, "in the circumstances of the case, to institute any proceedings "at present against the said Mr Robert Young, in regard to the "said action; dismiss the application contained in the memorial "presented by the said Reverend Robert Young to the said "Presbytery; and in regard to the notarial protest served by "him on the said Presbytery, before proceeding farther, direct "the said Reverend Robert Young to be cited to appear at the "Bar of this House on Monday next, that he may be heard "thereon." That accordingly the defenders, the Presbytery of Auchterarder, and the individual members thereof, thereafter entered an appeal against the aforesaid judgment pronounced on 8th March, 1838; but the House of Lords pronounced the following judgment: — "*Die Veneris*, 3° *Maij*, 1839. After hearing counsel upon the petition and appeal, as also upon the "answer put in to the said appeal, and due consideration had as "well yesterday as this day of what was offered on either side in "this cause, It is ordered and adjudged by the Lords spiritual "and temporal in Parliament assembled, that the said petition "and appeal be and is hereby dismissed this House, and that "the said interlocutor therein complained of be, and the same

" is hereby affirmed." That the judgment of the House of Lords having been applied in common form, and the cause having been remitted to the Lord Ordinary, his Lordship (Lord Murray,) on the 8th of June, 1839, pronounced a judgment, whereby it is found and declared, that the said Presbytery, and the individual members thereof, " are still bound and " astricted to make trial of the qualifications of the pursuer, the " said Reverend Robert Young, as presentee to the church " and parish of Auchterarder; and if, in their judgment, after " trial and examination in common form, he is found qualified, " to receive and admit him minister of the church and parish " of Auchterarder according to law. That the decree having " been allowed to become final, it was extracted by the pursuers; " and, on the second of July, 1839, they presented a memorial, " narrating the aforesaid decree (an extract of which was pro- " duced, and thereupon requested the Presbytery, and the " individual members thereof, forthwith to take trial of the " qualifications of the Reverend Robert Young, as presentee to " the church and parish of Auchterarder, in common form, and " if found qualified, to admit and receive him minister thereof: " and to enable the Presbytery, and the individual members, to " do so, the said Reverend Robert Young intimated that he " was ready and willing to present himself for trial and examina- " tion as aforesaid, at any time or place that the Presbytery " might be pleased to appoint. That nevertheless the said " Presbytery, and individual members thereof, at least the " majority of the members present at and composing the meet- " ing held on second July, did refuse, and do still refuse, to take " trial of the qualifications of the pursuer, the Reverend Robert " Young, or to fix any time for his examination, and trial, and " settlement, if qualified as aforesaid; whereupon the pursuers " caused a notarial protest to be served upon the Presbytery, " and upon each individual member thereof, intimating that

" they and each of them should be held liable to the pursuers " for all the loss, injury, damage, and costs already sustained, or " that may hereafter be sustained, by and through the illegal " refusal of the said Presbytery, and individual members thereof, " to implement and give full effect to the judgments of our said " Lords, and of the House of Lords, by taking trial of the " qualifications of the pursuer, the Reverend Robert Young, and " admitting and receiving him minister of Auchterarder as " aforesaid. That at the meeting of the Presbytery of Auch- " terarder held on second July last, there were present the " Reverend John Ferguson, minister of Monivaird, moderator; " Thomas Young, minister of Gask; Peter Brydie, minister of " Fossaway; James Walker, minister of Muthill; William " M'Kenzie, minister of Comrie; James Thomson, minister of " Muckart; John Reid Omond, minister of Monzie; John Clark, " minister of Blackford; William Laing, minister of Crieff; " Alexander Maxtone, minister of Fowlis; William Stodart, " minister of Maderty; Alexander Hill Gray, minister of " Trinity Gask; Alexander Laird, minister of Ardoch; Andrew " Morrison at Fordun, A M'Gregor at , John " M'Leish at Crieff, Thomas Millar at Ardoch, Andrew Bon " or Bayne at Dunning, and Andrew Lawson at Millearn, " elders; and after the memorial of the pursuers was read, it " was moved by the Reverend Mr Maxtone of Fowlis, and " seconded by Mr Laing of Crieff, 'That the Presbytery having " 'received a presentation from the Earl of Kinnoul in favour " 'of Mr Young, to the church and parish of Auchterarder, " 'and having sustained the same, that they proceed, in terms " 'of the decree of the Lord Ordinary, to appoint a day, and " 'they hereby appoint the first Tuesday of August, to take " 'trial of his qualifications as presentee to said parish, in order " 'to being collated or inducted to the secular rights and " 'emoluments of the benefice.' That it was also moved by the

" Reverend Mr Walker, and seconded by the Reverend Mr " Young, 'That the Presbytery refer the above documents " '*simpliciter* to the ensuing meeting of the Commission in " 'August.' And on a division the second motion was carried, " the Reverend John Ferguson, Thomas Young, Peter Brydie, " James Walker, William Mackenzie, James Thomson, John " Reid Omond, and Alexander Laird, ministers; and Andrew " Morrison, A M'Gregor, John M'Leish, and Thomas " Millar, elders, having voted for that motion; while the " Reverend John Clerk, William Laing, Alexander Maxtone, " William Stodart, and Alexander Hill Gray, ministers, and " Andrew Bon or Bayne, and Andrew Lawson, elders, voted " for the first motion. That to the aforesaid protest by the " procurator for the pursuers, as patron and presentee re- " spectively, the following answer was lodged with the notary, " by the minority of the Presbytery, at said meeting, " and also by the Reverend Dr Russell of Dunning, who " was absent from indisposition, conform to the extended " instrument of protest to be produced:—'We whose names " are hereunto subscribed, some of the individual members of " the Presbytery of Auchterarder, in answer to the representa- " tion and protest served upon us upon the second day of July " 1839, by the Right Honourable Thomas Robert Earl of Kin- " noul, patron of the church and parish of Auchterarder, and " the Reverend Robert Young, preacher of the Gospel, presentee " to said church and parish, hereby intimate, that at the meeting " of Presbytery referred to in said protest, we, upon the memo- " rial of the protesters being read and considered by the Presby- " tery, expressed our readiness to comply with the request there- " in contained, and to obtemper the decree of the Court of " Session, and we voted to that effect accordingly: That we have " always been, and are still ready to do so: and we therefore " protest that we shall not be liable for any loss, injury, or

" damage, which the said noble patron or presentee may incur " or sustain, in consequence of the refusal or delay by the majo- " rity of the members of the said Presbytery to comply with the " request in the said memorial and finding in the decreet of the " Court of Session. (Signed) John Clark, minister; William " Laing, minister; Alexander Maxtone, minister; W. Stodart, " minister; Alexander H. Gray, minister; Andrew Bon, elder; " Andrew Lawson, elder.' '*Dunning Manse, July* 9, 1839.— " As I was prevented by indisposition from attending the meet- " ing of the Presbytery of Auchterarder, upon the second day of " July 1839, and voting with the minority, I hereby express my " readiness to comply with the request contained in the memo- " rial presented to the Presbytery on that day: That I have " always been, and am still ready to do so, and I therefore pro- " test that I shall not be liable for any loss, injury, or damage, " which the noble patron or presentee may incur or sustain, in " consequence of the refusal or delay by the majority of the " members of the Presbytery of Auchterarder to comply with the " request in the said memorial, and finding in the decreet of the " Court of Session. I am,' &c. (Signed) 'James Russell.' " Addressed to 'Robert Hope Moncrieff, Esq. writer, Perth.' " That the said Dr Russell has again, by letter produced, intimated " his willingness to go on to take the said Robert Young on " trials, having the highest opinion of his qualifications, and " having frequently resorted to his aid and services to officiate at " the church of Dunning. That said Presbytery, and the indi- " vidual members thereof, at least those who composed the " majority of said meeting held on 2d July 1839, have, from " thence, and do still illegally refuse to make trial of the quali- " fications of the pursuer, the said Robert Young, as presentee " foresaid. That, in consequence of the illegal conduct of the " individual members of the said Presbytery of Auchterarder, at " least of the majority composing the meeting held on 2d July

" 1839 as aforesaid, in refusing to obey and give effect to the " foresaid judgments of the Court of Session and of the House " of Lords, and in respect of their illegal and continued refusal " to take the pursuer, the Reverend Robert Young, on trial as " presentee to the church and parish of Auchterarder, the pur- " suers, as patron and presentee aforesaid, have suffered, and are " continuing to suffer, serious patrimonial loss, injury, and " damage, for reparation of which the individual members of " said Presbytery, at least those individual members who com- " posed the majority at the meeting of Presbytery held on 2d " July last, and who do still continue to refuse to take the said " Reverend Robert Young on trials with a view to judge of his " qualifications for the office and benefice to which he has been " validly presented, are, conjunctly and severally, or severally, " liable to the pursuers respectively, according to their several " rights and interests as patron and presentee of the said parish " and church of Auchterarder: And although the pursuers have " often desired and required the defenders to make such repara- " tion, yet they refuse, at least delay so to do: And therefore " the said Reverend John Ferguson of Monivaird, and the said " Thomas Young, Peter Brydie, James Walker, William " M'Kenzie, James Thomson, John Reid Omond, and Alex- " ander Laird, ministers; and Andrew Morrison, A " M'Gregor, John M'Leish, and Thomas Miller, elders, who " composed the majority at said meeting, ought and should be " decerned and ordained, conjunctly and severally, or severally, " by decree of the Lords of our Council and Session, to make " payment to the pursuer, the Earl of Kinnoul, as patron of " the church and parish of Auchterarder, and as interested in " supplying said church and parish, under the presentation by " him in favour of the said Robert Young, of the sum of L.5000 " Sterling, in name of damages, and in reparation of the wrong " done to, and injury and damage sustained by, him, in respect

" of the illegal refusal of the defenders to take trial of the qualifi-
" cations of the pursuer, the Reverend Robert Young, as pre-
" sentee to the church and parish of Auchterarder, as aforesaid;
" and the said defenders ought and should be decerned and
" ordained, conjunctly and severally, or severally, by decree
" foresaid, to make payment to the pursuer, the Reverend Robert
" Young, of the sum of L.8000 sterling, in name of damages,
" in consequence of his having been illegally, and through
" the wrongful refusal of the defenders to discharge their duty,
" by taking trial of his qualifications as aforesaid, in terms of the
" judgments of our said Lords, and of the House of Lords
" libelled on, kept out of possession of the stipend, manse, and
" glebe of the parish of Auchterarder; and of the farther sum of
" L.2000, in reparation of the injury done to his character and
" usefulness, and to his status in the Church of Scotland, and
" as a *solatium* for the injury done to his feelings, by and
" through the illegal refusal of the defenders, to implement the
" judgments libelled on; together with the legal interest from the
" date at which the said sums of damages shall be ascertained,
" and in time coming till paid;" with expenses of process.

A record was made up on the summons, defences, condescendence and answers, in which the appellants admitted generally the statements in the respondents' summons, and stated in addition, —

" I. The defenders are ordained ministers and elders of the
" Church of Scotland, and, as such, have come under the most
" solemn obligations to conform themselves to the discipline of
" the church, and the authority of its several judicatories.

" II. The pursuer, Robert Young, as a probationer of the
" Church of Scotland, has solemnly bound himself to subject
" himself to the several judicatories of the Church of Scotland,
" and to submit himself to its discipline and government.

" III. The whole procedure complained of by the pursuer was

" adopted in obedience to the express injunctions of the ecclesi-
" astical superiors whom the defenders are bound to obey.

" IV. Neither the patron nor the presentee, the pursuers of
" this action, have suffered, or can qualify damage from the facts
" set forth by them.

The respondents stated as pleas in law, —

" I. It is *res judicata*, that the Presbytery of Auchterarder,
" and the individual members thereof, by refusing to take trial
" of the qualifications of the pursuer, the Rev. Robert Young,
" as presentee to the church and parish of Auchterarder, and by
" rejecting him exclusively in respect of the *veto* of a majority
" of male heads of families, acted to the hurt and prejudice of
" the pursuers, illegally, in violation of their duty, and contrary
" to the provisions of certain statutes, and in particular of the
" statue 10th Anne, c. 12.

" II. That in consequence of their refusal to give obedience
" to the judgments of your Lordships and of the House of
" Lords, and of their continued refusal to discharge their duty by
" taking trial of the qualifications of the pursuer, the Rev.
" Robert Young, as presentee, when duly called upon to do so,
" the defenders are liable in reparation of the loss, injury, and
" damage sustained by the pursuers, as patron and presentee, in
" terms of the conclusions of the libel.

The appellants, on the other hand, pleaded, —

" I. The summons is irrelevant. In particular,

" 1. The conclusions of the libel are directed against the
" defenders solely as individuals, in consideration of acts alleged
" to have been done by the Presbytery of Auchterarder in their
" official and corporate capacity, and, as the defenders as indi-
" viduals could not competently have taken the pursuer Mr
" Young on trial, they cannot be made individually responsible
" for the alleged refusal of the Presbytery to do so, unless it
" were libelled that they acted maliciously.

" 2. It is altogether incompetent to pursue the individual " defenders for acts done in a lawful court by the Presbytery " itself, on the allegation that they constituted the majority " present at a particular meeting, especially as the Presbytery " and its members are not parties to this action, either individu- " ally or as a body.

" 3. Even if this action had been directed against the Presby- " tery in its corporate capacity, its individual members cannot " be rendered responsible in damages for acts done by them as " a court, concerning the subject-matter of their jurisdiction, " and under the direction of the superior ecclesiastical judicatory " of this country, unless malice be averred.

" 4. There was no order on the Presbytery to take the pur- " suer Mr Young on trials on the 2d of July 1839, nor indeed " was an order upon them ever pronounced to any effect what- " ever. They were therefore fully entitled to refer the matter " to the Superior Church Court at their meeting of the 2d of " July 1839. Nor did they, in doing so, refuse to obey any " order of the Court of Session or of the House of Lords. As " this is the sole ground of damage libelled against the defenders " as forming the alleged majority of the said meeting, the action " ought to be dismissed.

" 5. By the constitution of the Church of Scotland, and the " statues relative thereto, it is not competent for any patron or " presentee to sue a Church Court, or its individual members, " for damages on the grounds libelled in this action, nor have " the pursuers any sufficient title to pursue the same.

" II. The pursuers are not entitled to damages from the " defenders. In particular,

" 1. The pursuer the Earl of Kinnoul, as patron of the " church and parish of Auchterarder, in the event of the Presby- " tery refusing to receive his presentee, is only entitled to retain " the vacant stipend under the Act 1592, c. 17.

" 2. The Presbytery are by law the only competent court by " whom the right of a presentee to the fruits of the benefice can " be completed by ordination, and unless the pursuer Mr Young " can establish that he would have been ordained by the Presby- " tery, or could have compelled them by action to ordain him, " he can qualify no damage in this matter.

" 3. The pursuer Mr Young is barred *personali exceptione* " from challenging the acts of his ecclesiastical superiors in a " civil court.

" 4. Generally no damages are due under this libel."

Cases by the parties were then ordered, which the Lord Ordinary (Cuninghame) reported to the Court, subjoining a very elaborate note, which will be found in 16 *F. C.* 852.

On the 5th March, 1841, the Court pronounced the following interlocutor: —

" The Lords, on report of Lord Cuninghame, having advised " this case, and heard counsel for the defenders, find, the action, " as laid in the summons, is relevant at the instance of both the " pursuers, and repel the objections to the relevancy thereof, and " to the jurisdiction of this Court to entertain and give effect to " the same, as stated in the pleas in law for the defenders, in the " revised answers to the revised condescendence: Find that, " after the judgments libelled on, it was not within the compe- " tency of the Presbytery, as a Presbytery of the Church, to " refuse or decline to take the presentee on trials; and after the " judgments libelled on, the Presbytery were not entitled to re- " fuse to take the presentee on trials: Find, that the acts founded " on in the summons do form grounds of damage in law: Find " that it is not necessary to aver malice in this case; Repel the " plea of personal exception pleaded against the pursuer Mr " Young, and decern *ad interim*, and reserve all question of " expenses, and remit to the Lord Ordinary.

The appeal was against this interlocutor.

Mr Attorney General and Mr Pemberton for the appellants. — Whatever feelings may have been exhibited elsewhere, or perhaps have found their way even where justice is administered, we shall endeavour to guard against viewing the questions embraced by this appeal in any other light than as mere legal technical questions; but we cannot help observing in the outset, that the judgment of the Court below seems to be founded rather on what in their views might be convenient and proper to be done, than upon those broad principles on which alone the law ought to be administered.

As the Presbytery of Auchterarder has not yielded obedience to the opinion of this House, they do not stand in any favourable situation at this bar. But your Lordships will still afford the case the same calm and dispassionate consideration which your Lordships would have given it if you had now heard of it for the first time. It is no part of our duty to impeach the soundness or the binding obligation of the judgment your Lordships then pronounced. We admit it to be entirely binding, and the question, the only question we now appear at your Lordships' bar to argue, is the present action, and the form in which it is brought. We have to argue that question with regard to the parties by whom, and the parties against whom, the action is brought. We have to argue the question whether this is an action which, by the law of Scotland, or the law of England, it is possible to maintain.

The points we maintain are, that the Presbytery was the competent Court for adjudicating what was before them, and that no action will lie against a court, or the members of it, for doing or for not doing any thing in the proceedings brought before it; that no action will lie against the individual members of a public corporate body for doing, or for not doing, what is, or may be considered, the duty of the body to do; or at all events, that

action will not lie without express averment of malice; that mere error of judgment will not affect the parties. The subordinate points we make are, that the judgment in the former case imposed no duty to do any thing in obedience to it, and was not against the present appellants; the action was against the Presbytery and the members individually, but the judgment was against the Presbytery collectively only; and that the act complained of by this action was nothing more than a reference by the Presbytery of the question before them to a superior court, which it was perfectly competent for them to make, having already come to a decision themselves.

I. By the act 1592, cap. 117, as restored after the Revolution by the act 1711, cap. "all presentations to benefices are to be "direct to the particular presbyteries, with full power to give "collation thereupon." In this the Presbytery came in place of the Bishop, when episcopacy was the established religion of the country. No doubt the Presbytery has a species of civil jurisdiction, as to tax that there may be things decent in the sight of all men; and in this respect they may be subject to the civil jurisdiction; but their ecclesiastical jurisdiction, and specially in regard to ordination to the ministry, is quite distinct from this civil jurisdiction, and is purely ecclesiastical. And in the administration of this ecclesiastical jurisdiction, the Presbytery exercises its functions as a court constituted in that behalf: this position is established by reference to *Ersk.* I. 5. 24, and *Bank.* I. 2. p. 51. Assuming the Presbytery, then, to be a court, the question is, whether the particular act complained of came within the exercise of the jurisdiction of the court, in regard to which the members must be responsible to the public justice of the country, if they failed to do that which they ought to do; but for which they could not be responsible to the individual who might complain of the doing or not doing of the act.

As there is an appeal from every act of the Presbytery to a

superior court, it is difficult to conceive how they can be said in any respect to have powers purely ministerial.

II. If the Presbytery be a court, action cannot lie against the members for doing or for not doing any particular act; the proceeding must be by compulsory process on the court itself; the individuals composing the court may be punished by a criminal proceeding against the court for disobedience of the orders of a higher tribunal, but no individual member is liable in any action for the non-obedience. The authorities in the law of Scotland are very meagre upon this subject, but the principle on which the position is founded is common to both countries, as it is essential to the free and independent administration of justice. In the trial of Governor Picton, 30 *Howel's State Trials*, p. 225, it was laid down, that if the act of the Governor complained of was of a judicial character, its illegality or motive was of no importance, a jury could not be permitted to speculate upon it, or be trusted to adjudicate as to the damage sustained. In Passett *v.* Godschall, 3 *Wilson*, 121, it was held, that action would not lie against Justices for refusing to grant a party a license to keep an alehouse, however corrupt or malicious the motive they might have for so doing. In Lowther *v.* Radlaw, 8 *Ea.* 113, it was held, that a party appealing to the Quarter Sessions was not concluded against objecting to their jurisdiction, but that trespass would not lie against Magistrates acting upon a complaint made to them on oath, by the terms of which they have jurisdiction. In Beaurain *v.* Scott, 3 *Camp.* 388, which was the case of an action against an ecclesiastical judge for excommunicating a party for disobedience to an order of his court, the action was no doubt sustained, but that was because the matter was not within the jurisdiction of the judge; he had exceeded his jurisdiction. But in Ackerly *v.* Parkinson, 3 *Maule* and *Sel.* 411, it was held, that action would not lie against the Vicar-General for excommunicating a party for not taking upon him administration of an

intestate's effects, after being cited so to do, though the citation was void, as the Vicar had jurisdiction over the matter.

[*Lord Chancellor.* — You may take for granted that when the Judge has jurisdiction, action will not lie for mistake or error in judgment.]

Can it be doubted, then, that the Presbytery had jurisdiction in this matter?

[*Lord Campbell.* — Can you make out that the Presbytery have a discretion to take on trial or not to take on trial, as Magistrates have to grant or to refuse a complaint?]

We are not bound to do so; the case of the Presbytery is within the principle of every one of the cases cited. A judge has no discretion as to whether he will exercise his jurisdiction or not, but you cannot compel him by action to exercise it; that can only be done by *mandamus* from the King's Bench.

[*Lord Campbell.* — Trying is a solemn act, in which the Presbytery have a discretion. If they had decided that the presentee was unfit or immoral, that would have been an act in the exercise of their discretion, and no action plainly would have lain against them.]

It is the duty of the Quarter Sessions to hear an appeal, but if they should refuse to do so, the only remedy would be by mandamus; no action would lie against them. Or if a Bishop, observing a person at first sight to be deformed, were to refuse to examine him, and return *non idoneum*, no action would lie against the Bishop. Both of these cases are strictly analogous to the present, and, indeed, not so favourable, for the Presbytery did not say they would not entertain the matter, but having entertained it, they could not examine the presentee, as he had not got the consent of the communicants, but they would refer the matter to their superior tribunal. In none of the three cases can it be suggested that there has not been a judgment exercised and delivered; it may be absurd — it may be unreasonable — it may be

bad in law — and subject to correction according to the forms prescribed by law, — but still a judgment has been exercised.

[*Lord Chancellor.* — The complaint is not because of the refusal before the judgment of this House, but for the refusal after it. This House has found that the Presbytery must take this particular individual upon trial. Taking upon trial seems to be merely a ministerial act, deciding on the trial may be a judicial one.

Lord Brougham. — Suppose the Court of King's Bench were to prohibit the highest ecclesiastical Judge, should he in the face of that prohibition pronounce a judgment that he had jurisdiction in the matter, he would be attached by the body.]

That is our argument; we do not question that a judge acting judicially may be impeached or attached in this country, or punished according to the form known in the law of Scotland, but we deny that any action will lie against him by the private party. If the Court of Session, for instance, on being asked to apply a judgment of this House, were to refuse, saying there must be some mistake, the judgment being contrary to their notions of the law, would that not be a judicial act? and yet no one would be bold enough to say, that an action would lie against the Court at the instance of the private party. In the present case the refusal of the Presbytery before the judgment of this House was as much actionable as that after it. The judgment did not make the law, it only made more clear what existed before. In Doswell *v.* Impey, 1 *Bar.* and *Cr.* 163, it was held, that action would not lie against Commissioners of Bankruptcy for having committed a bankrupt for not having answered sufficiently, inasmuch as they were acting within the limit of their authority.

[*Lord Chancellor.* — Was not the act there judicial?]

We think it was; but suppose the Judge had repeated the act, would he have been liable in an action? we apprehend not, yet

it seems impossible to draw a distinction between that case and the present. The judgment of this House did not give the Presbytery a mere ministerial duty to perform, but only pointed out how they were to act, and no wilfulness, however perverse, or stupidity, however gross, in the following out of that advice, can change the character of the act from being judicial to ministerial. The other cases which bear upon the question are, Tinsley *v.* Nassau, 1 *M.* and *Mal.* 52; Garnett *v.* Ferrand, 6 *B.* and *Cr.* 611; Fawcet *v.* Fowlis, 7 *B.* and *Cr.* 394; Mills *v.* Collet, 3 *Moo.* and *Pay.* 242; Ashcroft *v.* Bourne, 3 *B.* and *Ad.* 684. None of these cases even suggest that an action would lie against a judge, and the silence both of the reports and the text writers carries the matter far beyond any of the cases, as shewing that action will not lie. If the mode by which obedience to peremptory mandamus might be compelled be by action, the occasion has frequently occurred, and yet the reports shew no instance of it.

[*Lord Chancellor.* — Suppose a party is commanded by act of Parliament to do a ministerial act, and he refuse; he might be ordered by mandamus, or he might be indicted, but could the party injured by the refusal not bring an action against him?]

If the act were purely ministerial, we admit he could; but there is no instance of an action for acts done judicially, though erroneously, as ascertained by a superior court. If the act were purely ministerial, the minority should have performed it; they should not have allowed it to be put to the vote, or they should have treated the votes of the majority as a nullity.

III. But if action were competent, it can only be upon an express averment of malice, Orr *v.* Currie, 18 *F. C.* 624. Of this there is not the slightest hint in the present pleadings, and not only must there be an averment of malice, but that the party acted upon it alone in what he did.

[*Lord Cottenham.* — This is like a demurrer here; it is an

objection to the relevancy. This House has decided, that the Presbytery had no judicial power to take on trial; after taking on trial they may have a judicial duty.]

The judgment of the Court below in the former case was, that the Presbytery had refused to take upon trial in respect of the Veto act, and that was the essential part of the judgment. But it does not appear from any part of this record, that the refusal now was upon the same ground, or upon what ground. If the act of deciding when the party is before them be admitted to be judicial, the whole must be so, as much as the proceedings of any other court from the assembling to hear to the giving of judgment.

[*Lord Campbell.* — Lord Murray, applying the judgment of this House, found that the Presbytery was bound to take this individual upon trial.]

They might be ministerial to meet together, but when they did meet and begin their proceedings, they must be judicial. If a Judge were to strike a case out of the paper, or refuse to allow it to be entered, or abstain from sitting in judgment; though the consequences to a party might be ruinous, and the Judge knew this, and even intended it, would not these be judicial acts? but could action be maintained upon them? it is impossible to separate the acts of a Judge into ministerial and judicial; they must all be judicial.

[*Lord Campbell.* — Suppose a peremptory mandamus issued to the Bishop to grant a license, and he were to refuse obedience, would not an action lie against him by the party injured?]

The Bishop there would not be acting judicially.

[*Lord Campbell.* — In that case the mandamus would do neither more nor less than order him to take the party upon trial.]

IV. This action is further incompetent. 1. The present summons is framed upon the narrative of the proceedings in the first action,

and the ground of complaint is disobedience to the judgment there given. But neither the judgment of the Court below, of this House, nor of the Lord Ordinary applying that judgment, gave any orders upon the parties to do any act whatever; and were it otherwise, it is competent to the party to obtain his civil remedy under the conclusions of the summons in that action, which were not confined to mere declarator of right; the first action is still in dependence, and in it the respondents may still prosecute the petitory conclusions which remain undisposed of; while this is the case the present action is an attempt to obtain relief by a double remedy at one and the same time.

2. The Presbytery is a corporate body, fluctuating in its members. This action complains against certain members only of the body for disobedience to what is assumed to have been ordered in the first action, but it is not competent thus to sue a corporate body. What is done by it, is not the act of the individuals composing it, for which each may be made responsible, but of the body itself, which alone can be sued in respect of any corporate act. Some of the parties to the first action guilty of the wrong there complained of, are not now members of the presbytery; this only shews the impracticability of dealing with a fluctuating body of this kind in any other way than in its corporate capacity only. According to *Ersk.* I. 5. 16, letters of horning might in times of episcopacy have been directed against the Ordinary to compel performance of his duty; but he says, that this has never been resorted to against Presbyteries coming in place of the Ordinary. If such a form of execution could be resorted to, it could only be by the form of general letters against the corporate body, *Ersk.* IV. 3. 11. This passage shews, that relief cannot be had against the individual members. The letters of horning here spoken of, are done away; whatever the remedy be which has come in place of them, it must have the same direction.

[*Lord Campbell.* — Could the minority have been included in the charge of horning ?]

We apprehend they could; the act of the majority of a corporation, is the act of the minority. The allegation in the summons is, that "the Presbytery" and the members thereof; refused and "still refuse," suggesting of itself the necessity for the whole body being called, and it was called in the first action.

[*Lord Cottenham.* — There the object was to establish a right against the body.]

Be it so — it is the body which has disturbed the exercise of that right, and that only in a way consistent with the execution of the functions of the body; the Presbytery is subject to the jurisdiction of the superior Courts, and after referring the matter to the superior Courts, they were *functi* — without the authority of their superiors, they had no power.

[*Lord Chancellor.* — When this House declared the act to be lawful, they required no authority; that made it lawful.

Lord Brougham. — They don't refer to the Commission for power; they refer the documents. Suppose the Court of Chancery to order A to pay over money which belonged to B, would it be any answer for not paying over the money to say that he could not without the authority of B ? The thing is absurd.]

V. As to the right of the parties. 1. The patron cannot have any right to maintain such an action as this. The statute has provided the remedy by detention of the temporalities. In England, the patron may compel induction of his nominee, but, in Scotland, the law is different; and though there have been many instances of induction against the rights of the patron, there is not one instance in the books of an action by the patron, to enforce his right. 2. The presentee is licensed, but not in holy orders, and his complaint is, that something was not commenced which might have ended in his institution and induction; but the proceeding might also have ended in the opposite way; what damages

then can he qualify. No such remedy exists in England, and there is no instance of it in Scotland, and it is against principle that there should be. The law supposes the party to seek his induction upon much higher and more solemn grounds than can be involved in a claim of damages.

Mr Solicitor General, the Honourable Mr Wortley, and Mr Cook for the Respondents. I. It is assumed by the appellants, that the Presbytery is a corporation, but this they have yet to establish.

[*Lord Chancellor.* — The Lord Ordinary seems to treat them as a corporation.]

That may be so; but there is no evidence of their being such a body. For some purposes they may be *quasi* a corporation, but they have not the characteristics of such a body according to the notions of law, even in Scotland, where the nature of a corporation as distinguished from other bodies is not well defined. The Presbytery is merely an assembly of a part of the church, to whom are intrusted certain powers.

II. It has also been assumed, that the Presbytery was acting as a Court. No doubt it is a Court for certain purposes, but its duty in regard to the matter now in question, as in the case of the trial of the parish schoolmaster under 43 Geo. III. cap. 54, is distinct from its duties as a Court, and is purely ministerial — merely to take the presentee on trial, and determine whether he is properly qualified, and fit to be admitted. In this matter the Presbytery came in the place of the Bishop, who, no doubt, had contentious jurisdiction, but had other duties merely ministerial.

[*Lord Brougham.* — If you look at the finding of the Court, you will see that they are dealt with as no Court ever is dealt with. It is not immaterial to this inquiry to look at the terms of the presentation, which is in the ordinary form, and on the assump-

tion that the Presbytery is a Court having a discretion, addresses them as no Court ever was addressed.]

Certainly. And the judgment treats the body as having a duty to perform, and as having acted illegally in refusing to perform it. How could it do otherwise? there was no contention there between two parties in regard to which the Presbytery had to exercise any judgment.

[*Lord Campbell.* — At a farther stage, I don't know whether that would hold. The parishioners might bring a charge against the presentee?]

That would be quite a different proceeding. The duty at trial is strictly analogous to that exercised by the Bishop, who has a discretion as to his return upon examination, but none as to taking the party upon trial, if a peremptory mandamus have issued to grant a licence. But even if the Presbytery shall be held to be a Court, an inferior judge acting beyond his jurisdiction, and wilfully, is liable to an action, though he may also be indicted.

[*Lord Chancellor.* — What do you mean by "wilfully?"]

We mean "knowingly," as if an inferior judge, after prohibition by the King's Bench, should nevertheless proceed as if he had jurisdiction, disregarding the prohibition. The question of liability must be determined by the law of Scotland, which contains no principle opposed to such an action as this; but many authorities have been referred to, in analogous cases in England, to shew that the action will not lie.

[*Lord Chancellor.* — We have not had a single reference to the law of Scotland, except the case of Orr.]

Certainly not. Because there is none to make. In that case the party was not only a judge, but was held to have acted rightly. But even in England such an action would lie, *Comyn's Digest*, Art. "Actions on the Case." And in *Buller's Nisi Prius*, reference is made to the case of the Justice refusing to examine

a servant who had been robbed — the distinction there taken was, that when the judge has a discretion, he may exercise it; but if not, he must discharge his duty.

[*Lord Chancellor.* — If it *may* be a mistake, no action will lie — if it *must* be wilful disobedience, it will lie.]

Just so. And the principle has been recognized in Herbert *v.* Paget, 1 *Lev.* 64; Henley *v.* Corporation of Lyme, 3 *Bar.* and *Ad.* 77; Starling *v.* Turner, 2 *Lev.* 50; Herring *v.* Finch, 2 *Lev.* 250. In Ashby *v.* White, 2 *Raymond*, 958, and 14 State Trials, 785, "it is laid down, that where any statute requires an "act to be done for the benefit of another, or to forbear the "doing of an act which may be to his injury, though no action "be given in express terms by that statute, for the omission or "commission, the general rule of law in all such cases is, that "the party injured shall have an action." And again, at p. 794, "Where a man is injured, if he cannot bring his action "to recover the thing itself he hath lost by the injury, the law "will always give him damages in lieu thereof." And the competency of action, where there is absence of any discretion, was illustrated in the case of Schinotti *v.* Burnsted, 6 *Ter. Rep.* 646, where the Lottery Commissioners, having by statute a judicial jurisdiction in the matter, were held not to have any discretion as to declaring which was the last drawn ticket of the lottery, as the statute had declared which was to be so; and various authorities to this effect are to be found in *Comyn*, *voce* Misfeasance, A. 1, and "Negligence," A. 1. These authorities establish, that by the law of England, all persons who have a public duty to perform, and refuse to perform it, are liable to an action.

III. If the liability be established, then what was the nature of the act here which the Presbytery had to do? Was it one in which they might exercise their discretion? To shew that it was not, it is only necessary to read the judgment in the former case, and the interlocutor applying it. Whatever may be said

of the character of that part of the duty, in regard to judging of the qualifications, their first duty is, the taking upon trial. By the Acts 1592 and 1711, independently of the judgment of the Court below, and of this House confirming it, the Presbytery were bound to take the party upon trial: they had no discretionary power left to them in the matter, whether they were judges, or whatever might be their character; and these judgments fixed their duty in regard to this individual party.

IV. As to malice, if the party had been acting judicially, no doubt an averment of malice is necessary, but where there is a duty to perform, without any discretion, the mere refusal to perform is sufficient, without the presence or averment of malice. In Drewe *v.* Colton, 1 *Ea.* 563, *note*, it was laid down, as sufficient to maintain action, "if malice may be inferred from the conduct "of the officer;" and the competency of an action in such circumstances is shewn by Dawson *v.* Allardyce, 15 *F. C.* 262.

V. It is said that action cannot be brought against certain members only of a corporate body. But what principle is there in law or common sense why action should not be in this form. If three of five Commissioners in bankruptcy were to vote for the commitment of a party, it having been found that they have no such power, would action not lie against the three? how could it lie against the five? So of nonfeasance.

[*Lord Campbell.* — Is there any instance of an action against the majority of a body for nonfeasance?]

We are not aware of any; but, on principle, there must be such an action; as it is the duty of each one to concur in the performance of the duty required to be done. If the body were a corporation, those members refusing to obey a peremptory mandamus would each be liable to attachment, and it is no where laid down that an action also would not lie against them. On the contrary, the dicta are the other way. In King *v.* Ripon,

1 *Raymond*, 563, Chief Justice Holt said, that action might be brought against the members of a corporation who had caused a false return to a mandamus to be made in the name of the corporation. So in Rich *v.* Pilkington, *Carth.* 171, action was sustained against the mayor of a corporation for a return to a mandamus made by the corporation; though it was argued that he might perhaps have voted against the return; the answer being, that that would be matter of evidence on the plea of not guilty; which case shews distinctly that you cannot join in the action those who are willing to perform their duty. Herman *v.* Tappendale, 1 *East*, 555, was a case against the office-bearers of a corporation, but no notice was taken of the objection as to a portion only of the corporation being parties. In the case of corporations you must shew a tortious act in the individual complained against. What course could have been taken in the present case other than has been done? If a decree had been obtained, not only declaring the right, but ordaining the act to be done, such a decree could only have been enforced by imprisonment. Who could have been imprisoned but the recusant members? surely not those who were willing to do what the decree required?

But it is said, that there is no similar instance; that may be, as there never was before such an instance of contumacious resistance to the law, and from an ecclesiastical body especially: but what is there against the competency? is there to be no remedy? could damages be sought against the whole body? it is not pretended they could. This then can only be against the individuals as they act. In Gray *v.* Forbes, 5 *Cl.* and *F.* 356, individuals distinguished from the corporation were recognized, and the right of one alone to appeal to this House. In Edwards *v.* Cruickshanks, 3 *D. B.* and *M.* 282, the majority and minority were the opposing parties, and recognized as entitled to set up separate pleadings and defences. And in

Clark *v.* Henderson, 1 *D.* and *M.* 955, the complaint, the proceedings, and the judgment, were against the majority of the Presbytery.

VI. With regard to the right of the parties; 1*st*, as to the patron, retention of the temporalities works no benefit to him; it is not for himself he does so; it is for their application to pious uses.

[*Lord Campbell.* — That is *vexata questio.*]

Ersk. III. 1. 14. says, "where a delinquent is subjected by "statute to a determinate penalty, without any mention of re- "paration to be made to the private party, his claim of damage "which arises from the common law, is not from the silence of "the statute construed to be cut off." The retention then is a penalty, and does not interfere with the right of the patron to recover damages. 2d, As to the presentee, he had an antecedent right to be admitted on trial, and it cannot be denied that he has sustained a severe patrimonial loss by being kept out of the benefice; but if this action be incompetent, he is without a remedy.

Mr Attorney General. — It is admitted, that trying the qualifications is judicial, and that the Presbytery have a discretion in regard to the return they are to make. But what distinction can be drawn between the inception and the completion of a judicial act? between the act of the judge ordering a cause in his paper to be called, and judging in it, and refusing to allow it to be called at all? is he not as much a judge in the second case as the first, and would action lie against him in the one case more than in the other? But in this record the Presbytery is called "the "only competent legal Court."

[*Lord Chancellor.* — Calling it a legal Court, don't make it a Court of law.]

In Clerk *v.* Presbytery of Dunkeld, 16 *F.C.* the finding was in the exact same terms as are used in the summons here.

But it is said that if this action won't lie, where is the remedy ?

— what of that? it is not true that every wrong has its remedy; there are many wrongs which have no remedy, and of all cases this is the most improper one in which to make a new precedent of a remedy, where feelings of a much higher nature than damages could excite, may possibly be involved.

All the cases cited on the other side are plainly inapplicable, as in every one of them the act in question was purely ministerial, involving no exercise of judgment or discretion. But Henley v. Corporation of Lyme, is useful, as shewing that the action was not against the individual members who had refused to repair the pier, but against the Corporation as a body. And what is stated in Rolles' abridgment as to the clerk's right to have an action, if the archbishop refuse to induct him, the clerk being already in orders, shews an obvious distinction between that case, and the present, where the presentee is not yet in holy orders, and for aught known, may never be. As to Dawson v. Allardyce, that was an instance of excess of jurisdiction, where action would undoubtedly lie.

But assuming the act to be ministerial in this case, action cannot lie against a part only of the corporation.

[*Lord Chancellor.* — Why do you call the Presbytery a corporation? you must establish that first.]

I merely follow the Solicitor General's argument, who, for this purpose, called it a corporation. In all the multifarious cases of *quo warranto* against corporations, was it ever heard or suggested that action would lie against the members? If it would lie, where is it to stop? If the votes at a meeting should be equal, would it lie against a party for staying away, and not turning the vote?

LORD CHANCELLOR. — My Lords, this was a proceeding instituted by the Earl of Kinnoul and Mr Young, for the purpose of obtaining compensation in damages from the defenders, for having refused to take upon trial Mr Young as the presentee of the

church of Auchterarder. The case came before the Court of and Session, they decided in favour of the pursuers, by an unanimous decision. From that judgment, the defenders have appealed to your Lordships' House.

It was not, I believe, from any real inherent difficulty in the case, but on account of the importance of the subject, that your Lordships took time to consider the judgment.

There is one point which is perfectly clear, and that forms the basis of the whole proceeding. It is perfectly clear, that it was the duty of the defenders to take Mr Young on trial of his qualifications, as presentee of the church of Auchterarder. That question was decided by the Court of Session. It afterwards came before your Lordships' House by appeal, and your Lordships confirmed the decision. The law therefore was established by that decision, and it could not afterwards be controverted: it admitted of no further question; no further appeal. Therefore, I say it was a point clearly established, that it was the duty of the Presbytery to make trial of Mr Young's qualifications as presentee to the church of Auchterarder.

My Lords, the defenders cannot plead ignorance of the law in this case, even if that ignorance would have availed them, because they, or at least some of them, were parties to that suit, and that inquiry. Nay more, after the judgment had been affirmed by your Lordships' House, the Lord Ordinary, (Lord Murray,) pronounced another interlocutor, by which he decreed that the Presbytery, and these defenders by name, were still bound to make trial of the qualifications of Mr Young.

That interlocutor became final; it was extracted on the 2d of July; it was served on the defenders, and at the same time, Mr Young presented himself in order that they might make trial of his qualifications. The question was put to the vote; it was decided against accepting him upon trial by a majority, and by evasion, (for I consider it a mere evasion,) the matter was

referred to the General Assembly. I consider, therefore, the facts established, that it was their duty to take him upon trial, and that they refused to do so. Those are two points I think which do not admit of dispute.

Now, my Lords, what is the rule of law as applicable to questions of this kind? When a person has an important public duty to perform, he is bound to perform that duty; and if he neglects or refuses so to do, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages, by way of compensation for the injury that he has so sustained.

My Lords, that was expressly laid down — if it is necessary to cite authority for the purpose — in the case of Sutton *v.* Johnston, by Mr Baron Eyre in delivering the judgment of the Court of Exchequer in that important case; and other authorities might be mentioned to the same effect.

My Lords, a case was cited at the bar, from Leonard's Reports, of this description: — A party had applied to a Justice of the Peace to take his examination under the statute of Elizabeth, the statute of Hue and Cry; the Justice had refused to do this, and the party had in consequence sustained injury, because he was deprived of his right of bringing a suit against the Hundred, in consequence of that neglect. It was held upon the principle I have stated, that he was entitled to recover damages against the Justice for this neglect of his public duty, he having in consequence sustained a personal injury.

Again, my Lords, another case, which was also cited at the bar, was the case of Stirling *v.* The Lord Mayor of London. Stirling was a candidate for the office of Bridge Master; the Mayor refused to take a poll, in consequence of which he brought an action against him, and it was held, that that action might be sustained to recover damage for the injury. Upon what principle? That it was the duty of the Lord Mayor to take the poll;

that he neglected that duty; that the party in consequence sustained injury, and it was therefore held, that the action might be maintained.

But, my Lords, this is not the rule in England alone; it is a general rule applicable also to Scotland. It is as much the law of Scotland, as the law of England. A case was cited at the bar, to which I have no doubt my noble and learned friends have referred, which was the case of Adam Innes *v.* the Magistrates of Edinburgh. It was a case of this description: — Some buildings were going on in Edinburgh, a pit was dug in one of the lanes for the purpose of these works; the party fell into the pit and was hurt, and he brought his action against the Magistrates of Edinburgh to recover compensation for the injury he had sustained. It was the duty of the Magistrates of Edinburgh to take every possible precaution for the purpose of preventing accidents of this kind; it was considered that they had neglected that duty — that they had neglected a public duty, and that the party had in consequence sustained an injury, and the Court decided that he was entitled to recover damages for the injury he had sustained. So that this principle is applicable both to the law of England and to the law of Scotland; it is a general universal principle.

Now, my Lords, what is the argument of the appellants in this case? It is said that this was the decision of a Court, the Court of Presbytery; that they were acting judicially; and that acting judicially, therefore, if they committed an error, no action can be maintained against them. My Lords, I do not deny that principle as a general principle; and if they had admitted that gentleman upon trial, and after taking him upon trial, had come to the conclusion that he was not properly qualified, in that case it would have been a judicial decision, and might not have afforded a ground for supporting an action, although the party should have sustained damage in consequence of it.

But, my Lords, that does not apply to the present case. Here

they had no discretion to exercise; they had to form no judgment; they were bound by the law to do the act; they could appeal to no tribunal. It was imperative upon them to accept the party upon his trial; it was their public duty. It bears no analogy, no resemblance to a judicial decision; and I apprehend that under such circumstances, it is quite clear that this action can be supported.

But, then, my Lords, it is said that the action cannot be supported against these parties, as the act complained of was the act of the body. How can you bring an action, it is said, against them individually? My Lords, it was these individuals who did the wrong. They all of them refused to take Mr Young upon trial; and they by their vote prevented his being taken upon trial by the others; they are the parties therefore that did the injury, and consequently they are subject to an action. Suppose it had been an unanimous vote — that all had concurred in it, the party sustaining the injury might, if he had thought proper, have brought an action against all of them, or against any one: Because it is laid down as a general principle that torts are joint and several. It would not have been necessary for him to bring an action against all, if all had concurred, but he might have brought his action against any one or more of them as he might think proper. Here he has brought his action against those who did the wrong, and they are clearly liable to make compensation and to give redress.

My Lords, it was suggested at the bar in the course of the argument, that it is possible, as this was put to the vote, that some of these parties might have voted on the other side. Had that been the case, that circumstance, so far as such individuals are concerned, would have been a ground of defence. But that does not appear upon the record. It is not stated; it is not suggested. On the contrary, from the shape of the record, the conclusion is directly the other way.

My Lords, there is a case which I believe was referred to at

the bar, which, with respect to several of these points, appears to me to be closely in point. I allude to the case in *Carthew*, of Rich *v.* Pilkington, Lord Mayor of London. That was an action brought against the Lord Mayor of London for a false return to a writ of mandamus. The objection made to that action, was of this description: — The act was done by the Lord Mayor and Aldermen—"You ought to have brought your action "against all." — "No," said the Court, "it is a tort; it is joint "and several. The party might have brought his action against "all, but he was entitled also to have brought his action against "any one." It was stated that it was a corporation. "No," said the Court, "it is not a corporation; it is a Court, and as a "Court, the action may be brought against all the members, or "against any one of them." Then this suggestion was made: — "But how does it appear that the Mayor did not object to "the return?" What was the reply of the Court? "Had it "so appeared, or should it so appear upon the trial, that will be "a defence to the action, so far as he is concerned, upon the "plea of not guilty."

My Lords, I think I have now adverted shortly, but I hope as clearly as I can, to the different points in this case. The principle is this, that here was a public duty which the parties were bound to perform; they knew that they were bound to perform it. They neglected that duty. Individuals have sustained injury in consequence of their neglect of that duty. It was not a judicial act; it was an act that was imperative upon them, with respect to which, they could exercise no discretion. These are the parties that did the act, and they are the parties therefore against whom the action is sustainable. I would submit therefore to your Lordships, with all deference, that the judgment of the Court below ought to be affirmed.

Lord Brougham. — My Lords, agreeing entirely in the proposition which my noble and learned friend has submitted to your

Lordships, I am quite sure that your Lordships will feel that I owe an apology both to my noble and learned friend, and to you, for entering at all at large into the question, which he has so clearly, so luminously, and so satisfactorily treated. Nor should I have done more than express my entire concurrence, subject to a single verbal alteration, which, in fact, my noble and learned friend himself, from the context clearly intended, that instead of saying, "that had they taken Mr Young upon his trial, and "decided against him, by rejecting him, in that case they would "have acted judicially, and so have been protected." My noble and learned friend, of course, from the context of his argument, could only have intended to say, "that that question not being "now before us, but being shut out by the refusal to take him "upon trial, it might, for aught we know, have been an argument "competent to the Presbytery, in the case supposed." My Lords, I should with that single qualification, which, in fact, is a mere verbal correction, have rested satisfied with expressing my entire agreement with my noble and learned friend, had it not been that the very great importance of the case, and the extraordinary notice which the circumstances of it have naturally excited, lead me to trespass upon the time and patience of your Lordships, by entering a little more fully into the case.

My Lords, the facts of this case are, as my noble and learned friend has justly observed, all admitted, and it is material to note them, and to observe the shape of the action. The Court of Session, in the former suit, which was brought against the Presbytery of Auchterarder, and also against the individual members of its majority, after finding the rights of Lord Kinnoul as patron, the valid presentment of Mr Young, and the continued refusal of the Presbytery to take trial of his qualifications, found, that by this refusal, the Presbytery acted to the hurt and prejudice of both pursuers, illegally, and in violation of their duty. This decree was affirmed by your Lordships upon

appeal. Upon the proceeding below, to apply the judgment of affirmance, the Lord Ordinary pronounced an interlocutor, finding, that the Presbytery, and the individual members thereof, are bound and astricted to make trial of Mr Young's qualifications, and if they find him qualified, to receive and admit him to the church of Auchterarder, according to law. This decree was allowed to become final, and stands as such, unappealed from to this day.

A fresh application was then made by the respondents, (the pursuers below,) to the Presbytery, and the individual members, who still refused to take Mr Young upon trial. Two motions were made at a meeting of the Presbytery; one, that he be taken to trial, the other, that the presentation be referred to the next meeting of the Commission of the General Assembly. The latter motion was carried by the voices of the present appellants, the former motion being rejected. Therefore, the refusal was plain and deliberate.

The present action is brought, — not like the former, against the Presbytery and the individual members forming the majority, who rejected the motion, — but against those individuals only; and it is brought for damages on account of that refusal. But it is observable, that the summons concludes differently on behalf of the two pursuers, (the respondents here.) After setting forth, "that "both pursuers have sustained damage, in consequence of the re- "fusal to obey, and give effect to the judgments of the Court of "Session, and of this House, and also in respect of the illegal and "continued refusal to take Mr Young to trial," the summons concludes "to have it found, that the defenders, (the appellants "here,) should make reparation in damages to Lord Kinnoul, "the patron, for the illegal refusal to take Mr Young to trial, "and that the defenders should make reparation to Mr Young, "the presentee, for the refusal to take trial of his qualifications, "according to the judgments of the Court of Session, and of this

" House;" so that the conclusion for the patron is general, grounded on the illegal refusal of his presentee. The conclusion for the presentee is grounded on the illegal refusal to perform their duty, according to the judgment below, and here.

This difference might be of importance, if it should appear, that the decrees below, and here, in the former suit, did not directly order the Presbytery to take the presentee to trial, (which is certainly true,) and if it should also be held, that the general averment, applicable to both pursuers, extends over the particular conclusions of the summons. But it is clear that this is not the case. The general averment of damage sustained, in consequence of the refusal to obey the judgments below, and here, may be incorrect, inasmuch as these judgments did not order the Presbytery to take Mr Young to trial, but only declared the Presbytery bound so to do. But the conclusions, at least the conclusion in behalf of the presentee, only seeks for damages in respect of the injury arising from the defenders refusing to discharge their duty, by taking to trial "in terms of the judg- " ments;" and these judgments, clearly by their terms, declare that duty. The conclusion " for solatium to Mr Young's feelings, " by the refusal to implement the judgments libelled on," may be rejected as surplusage, if it should be held, that the judgments libelled on do not command the taking to trial.

Thus, it is clear, that there remain sufficient conclusions; one in behalf of the patron without any reference to the judgments; the other in behalf of the presentee, referring to those judgments; but, referring to them as declaratory, and not mandatory. Hence, it is wholly immaterial, were we to admit that no mandatory decree has been pronounced, or can be libelled on, because the case of the respondents must stand upon the right which the patron had to present, and he and the presentee to have trial of qualification, independent of any judgment. Though the judgments make the duty of the Presbytery more plain, and

their refusal to act in conformity with it more contumacious; and though, as regards the presentee, these judgments are libelled on, yet, as regards the patron, the ground is general, and even as regards the presentee, there is a conclusion which does not assume any command in the judgment libelled on. So that the patron might recover upon the breach of duty, were there no judgment at all, and the presentee may recover under the judgment, as the ground, the declaratory ground, of the duty alleged to have been violated.

The question then, and the only question, is, whether the action for damages well lies against them individually for their refusal? The duty is declared by the original judgment affirmed in this House. If that judgment had not been libelled on at all, it would have been decisive of the question, whether the Presbytery were, or were not, bound to take the presentee to trial. If it had been between other parties, that judgment would have been of the highest authority, of the most binding force, as shewing the duty of the Presbytery in the present case. But being a judgment between these very parties, and on this very cause, it has the force of a judgment in the cause, and it estops the parties to aver, that the taking of the presentee to trial was not the bounden duty of the Presbytery.

So it would have been had the judgment not been libelled on at all; so it is in respect of the conclusion for the patron; but so it is yet more emphatically in respect of the conclusion for the presentee, who libels upon that judgment as declaring his right to be taken on trial. He comes not to demand execution of a mandatory decree; had he done so, there might be some ground for the objection that the decree is not mandatory; but he wants no such mandatory decree. He complains of a breach of duty on the part of the appellants, by their refusal to perform the duty; and in proof of this duty, the refusal being admitted, he shews and he relies on the final judgment declaring that duty,

although he might have relied on the same grounds on which that judgment was pronounced, and by which it may still be supported, independent of the respect due to the authority from which it proceeded.

We come then to the only question now properly in issue between the parties: — "Can this action be maintained against "these appellants for their refusal?" If it be said that they are individuals, and not the Presbytery, and that the former action was against the Presbytery, as well as the individuals, but the judgment was given only against the Presbytery, the answer is twofold. First, from what has been said, the patron's conclusion rests on the general breach of duty, and not on the refusal to act according to the judgment; consequently, this objection could at the utmost only affect the presentee's case. But, secondly, it is not applicable to that case either, for the interlocutor of the Lord Ordinary now appealed from, on applying the judgment of this House, expressly finds, that the individual members, as well as the presbytery, are bound and astricted to take the presentee upon trial. Therefore, we come to the only question: "Does this "action lie, in respect of the kind of duty alleged to be "violated, the kind of body to which the appellants belong, "and the kind of proceeding in which they were engaged?"

If the law casts any duty upon a person which he refuses, or fails to perform, he is answerable in damages, — as my noble and learned friend has stated, — to those whom his refusal or failure injures. If several are jointly bound to perform the duty, they are liable jointly and severally for the failure or refusal; and if it is a duty which the majority of the members are bound to perform, those who by their refusal prevent the greater number from concurring, are answerable to the party injured; that is, all those who constitute a majority, such majority committing the non-feasance, violate the duty imposed, disobey the law, occasion the injury, and are answerable for it.

Nor are these propositions the less true generally, and as the rule, because there are exceptions, and a very few exceptions introduced into the law and constitution of this, and indeed of every country, from the necessities of the case. Thus, the legislature can of course do no wrong. But so its branches are placed beyond all control of the law. And the courts of Justice, that is, the superior Courts, Courts of general jurisdiction, are not answerable either as bodies, or by their individual members for acts done within the limits of their jurisdiction. Even inferior Courts, provided the law has clothed them with judicial functions, are not answerable for errors in judgment, and where they may not act as judges, but only have a discretion confided to them, an erroneous exercise of that discretion, — however plain the miscarriage may be, and however injurious its consequences, — they shall not answer for. This follows from the very nature of the thing. It is implied in the nature of judicial authority, and in the nature of discretion, where there is no such judicial authority. But where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, every body, — whatever be its name, and whatever other functions, of a judicial or of a discretionary nature, it may have, — is bound to obey, and, with the exception of the Legislature and its branches, every body is liable for the consequences of disobedience; that is, its members are liable, through whose failure or contumacy the disobedience has arisen, and the consequent injury to the parties interested in the duty being performed.

The distinction, in this respect, seems to vanish, even between the higher and inferior courts, — those of general, and those of limited jurisdiction; but, for things done in the exercise of judicial functions, inferior courts are answerable where the higher are not. The case in 3d *Leonard* shews, that for doing a judicial act, — that is, a proceeding to judgment and execution pending an appeal, namely, a *habeas corpus cum causa* to remove the plaint, —

the steward of a court, having jurisdiction in the matter, is liable to an action of damages.

It was at one time held, that commissioners of bankrupt were protected by their supposed judicial functions; but this being fully considered in the case of Miller *v.* Seare, 2d *W. Blackstone*, 1141, the *Lord Chief Justice*, and *Mr Justice Blackstone*, and *Mr Justice Nares* held, (*Mr Justice Gould* dissenting,) that those commissioners were liable in an action of false imprisonment for having improperly committed a bankrupt, who, in the opinion of the Court, had given a satisfactory answer, the commissioners not having deemed it satisfactory.

It is true, that in Doswell *v.* Impey, in 1st *Barnewall* and *Cresswell*, 163, the Court so far differed with the former decision as to hold that the commissioners had the authority vested in them of determining whether they should be satisfied or not. But this was upon the words of the statute, (5th George II,) "that "the bankrupt shall full answer make to the satisfaction of the "commissioners." And even in this view, the Court expressly said "that they did not decide how it would have been, had an "action on the case, and not trespass, been brought;" and they expressly did hold, that the commissioners were liable to criminal prosecution for any abuse of their authority. So that there was nothing decided, nor any thing said, to shake the main part of the decision in Miller *v.* Seare, — that the commissioners had not the protection enjoyed by Judges for their acts. Accordingly, in the subsequent cases of Isaac *v.* Impey, in 10th *Barnewall* and *Cresswell*, 44, and Crowley *v.* Impey, in 2 *Starkie*, 261, no objection was taken to the action against the Commissioners, but the contest arose upon whether or not the bankrupt or the witness had refused to answer.

It was afterwards by the new bankruptcy acts provided, that the Commissioners should have the protection of Courts of Record, that is, of the higher Courts, for the protection extends

to all these, whether Courts of Record or not, as the High Court of Admiralty, and Courts of Vice Admiralty.

It has also been held, that persons clothed with judicial authority, not being Judges of the Higher Courts, are liable to an action for not executing duties cast upon them, of a kind very nearly approaching to judicial, as in the case to which my noble and learned friend has referred of Green *v.* Buccle, in 1st *Leonard*, 323, which was an action against a Justice for refusing to examine a witness, necessary to give the party a remedy under the 27th of *Elizabeth*. The Courts have said "these duties are not judicial, "and therefore the action lies, though it is not easy to distinguish "them from their judicial functions, and though it is quite certain "that no such action would lie against Judges of the superior "Courts." Certainly, both the functions of the Commissioners of Bankrupt, and those of Justices of Peace, and those of Stewards of Courts having local jurisdiction, are much more of a judicial nature than those of the Presbytery are in the matter of receiving a presentee, and taking him to trial of his qualifications.

It is not denied that the Presbytery has certain functions of a judicial, or *quasi* judicial nature. It is not necessary for the purpose of the present question, to inquire how far the discretion is vested in them of deciding absolutely on the qualification of a presentee. It is not necessary now to go into the question, how far the Presbytery, being commanded to receive and admit the presentee, are compellable to do whatever is necessary for his reception and admittance. These questions do not here arise; because the Presbytery have resisted in the outset by refusing to take the presentee on trial; and until they do so take him, no such question can arise. No discretion is vested in them to refuse the trial. The law has been declared both generally and in this particular case, the Court below and your Lordships have decided that there is no such discretion, and that the Pres-

bytery are bound without any option to take the presentee on trial.

But that which seems to make an end of this defence, — the defence grounded on the alleged judicial character of the Presbytery,—and which indeed goes far to make an end of the whole defences together, is the finding of the Court below, and affirmed in this House. When, I would ask, was such a finding ever applied to the proceedings of a court having the protection of judges for all their judicial acts? When was an act, either judicial or *quasi* judicial, of one tribunal, ever so dealt with by another and a higher tribunal? The judgment is, that the "said "Presbytery have refused, and continue to refuse, to take the "presentee to trial, on the sole ground that the majority of male "heads of families, communicants in the parish, have dissented, "without any reason assigned, from his admission as minister."

This is the alleged judicial act. The finding sets forth the act of refusal, and the reason assigned for that refusal. Then how does the judgment proceed to deal with this alleged judicial act, "Find that the said Presbytery, in so doing, have acted to the "hurt and prejudice of the pursuer, illegally, and in violation of "their duty, and contrary to the provision of the statutes." And this finding is affirmed by your Lordships on appeal.

Now, if any person will shew me a similar judgment, lawfully pronounced by competent judicial authority; still more, a judgment from which there can be no appeal, pronounced upon the conduct of another body inferior, and which was a party to the suit in which the judgment was given,—if any person will shew me a judgment so pronounced, by a superior tribunal, declaring the proceedings of the inferior body to have been had illegally and in violation of its duty, and to the injury of the party complaining, I shall then have no difficulty in knowing how to deal with the inferior body, and with any pretence which it may set up to the character of a judicial body, or any protection

which it may claim for its acts as judicial acts. The judgment, in truth, by its frame, as completely negatives the taking on trial to be a judicial act, as distinctly declares the presbytery, in refusing a trial, to have been acting in a capacity other than judicial, as if it had in terms negatived the one of these propositions, and affirmed the other.

Cases and extreme cases have been put in the argument with much ingenuity, and they share the fate of such suppositions when forced into the service of an untenable contention. They either may be admitted, and do not touch the question in hand, or they are so far doubtful as not to decide it. Thus it is asked, if any one ever heard of a judge being sued for not going into court to try a cause, when the parties were ready, at a great expense, to proceed. The case in 1st *Leonard* shews, that this at least will not apply to all the acts of inferior judges. But suppose it were admitted, that in the case put no remedy lies against judges of the superior Courts, the law and constitution has provided a remedy, by their removal, for a breach of duty, or neglect of duty. What remedy is there against the Presbytery? None but by appeal to the Synod, and ultimately to the General Assembly; and they who deny the Presbytery's responsibility to the municipal law, of course will also deny the responsibility of the Synod and the General Assembly, and deny also, that the three branches of the Legislature, concurring, could remove the offending Presbyters as they can remove the delinquent judge, without any new law, or by a mere proceeding pointed out by statute. Here then would be a complete case of *imperium in imperio*—of bodies existing in the country, and exercising important functions—functions nearly affecting the rights, the civil and patrimonial rights of the subject—and yet, not placed under any control of the law, or rendering any obedience to those intrusted with the office of administering it. Nor must it ever be forgotten, that to this conclusion the whole arguments of

these Church Courts lead; that this is the very claim which they set up more or less covertly as suits the different stages of their contention, that, more or less concealed from our view, this is the doctrine which pervades their whole reasoning.

We have been assuming, that the extreme cases put are clear in themselves, and have been admitting that they resemble the one in hand, which they do not. But is it quite certain that these extreme cases are so clear and incontestable, as at once to dispose of the present question even upon that admission? I greatly doubt it; even as to Judges of the higher Courts I doubt it. The case put, of members of this House not attending a Committee of Privileges, is quite clear by the Common Law of Parliament, and also by the declaratory words of the statute, (the Bill of Rights.) But if asked, whether a judge is or is not liable to make reparation for the injury he may occasion, by wilfully, and without reasonable cause, or any cause whatever, but his own caprice, refusing to act judicially on a day when parties are prepared, at great expense, to try their cause before him, and then leaving the circuit town without performing his duty?—I can only say, that when such a case comes before me I shall be ready to deal with it; that at present I am not called upon to determine it, but that I am by no means prepared to admit it as clear law, that no action will lie for such a breach of duty; and unless it is perfectly clear, the reference to such a forced case nowise helps the argument or speeds us towards a conclusion. That the superior Judges, even acting judicially, and in a matter of which they have unquestioned jurisdiction, may render themselves answerable to parties, appears to be admitted in the opinions delivered by the Judges in the case of Hagart's trustees v. Hope, in 2d *Shaw's House of Lord's Cases*, 125. Their Lordships there put cases in which a Judge would be liable to an action for injury done to a practitioner in deciding a cause, such injury being the statement of slanderous matter not necessary for the decision.

It would be difficult for the same Judges to have adopted, as quite clear, the positions assumed in the present case as incontrovertible on the absolute protection of Judges in acts of misfeasance, and acts of nonfeasance, as connected with their judicial functions.

But it is far more fruitful, and more calculated to throw light upon the question, that we should look a little at cases more resembling the present, and at the rights of bodies whose functions more nearly approach those of the Scotch Ecclesiastical Courts. The Presbytery closely resembles the Bishop, and its functions resemble his functions in respect of the trial and admission of presentees. Now, as to the Bishop, he exercises his judicial functions by officers whom he appoints; and these are to all intents and purposes Judges, exercising, indeed, very high judicial powers. If they exceed their jurisdiction the temporal Courts interfere to prohibit them. If they persist, the temporal Courts punish them as for a contempt, by attaching them and imprisoning them. So indeed do they the Judges of Admiralty Courts — even the Judge of the High Court of Admiralty itself, if he prove refractory, and disregards their prohibition. And, in all these cases, the party aggrieved by the contumacy has his remedy by action against the Judge.

But this may be said to be a case where the Judges are acting without jurisdiction. If, however, after being commanded to desist, those Judges were to proceed, and to say that they proceeded because they judicially decided that they had jurisdiction, this would not avail them an instant even in shewing cause why they should not be attached by their bodies for their contempt, nor could any such averment be sustained or pleaded in justification to an action for the injury sustained. And yet, what else than this is the defence now set up by the Presbytery against the complaint, that they have refused to take upon trial according to their duty, declared by the supreme judicial authority of

the country, an authority as competent to restrain them as the Temporal Courts are to restrain the Spiritual or Admiralty? That authority says, "You are bound to take the presentee on "trial, you have no discretion, no jurisdiction to refuse it." The Presbytery says, "We will not, because it is our province to say "whether we will take him on trial or not." And be it observed, unless the Presbytery says as much as this, they say nothing at all to maintain their defence. But wherein does this differ from the case supposed, but which certainly involves too great a contumacy ever to have happened, of the Bishop or his Judge, or the Judge of the Admiralty refusing to obey a prohibition, upon the ground that it is his province to determine whether or not he shall attend to it?

But this is not all. The present question regards only the refusal to take on trial, — the refusal to proceed. Nothing now arises upon the discretion of the Presbytery, in conducting the trial. On that I give no opinion. Certainly I give none, that differs from the dicta thrown out by some of the Judges below, particularly the Lord President. I only say, that we are not at present called upon to decide either way upon the point. The question before us merely regards the refusal of the Presbytery to proceed at all. Now the Bishop with us, in whose place the Scotch Presbytery stands, is answerable in an action for not admitting a Clerk; and though damages could not be recovered at common law, but only by the statute of Westminster the second, from the law's extreme jealousy of Simony, as Lord Coke says, in second institute, 362, the patron alone being the party demandant in such an action — from another refinement of our law, which regards the interest of the Clerk, before institution, as merely spiritual, (a refinement wholly unknown in the law of Scotland,) — yet the liability of the ordinary to the real action by the common law, shews plainly that he had no power such as that claimed by the Presbytery, of absolutely refusing the Clerk,

for whatever reason he might choose to assign, or without any reason at all.

A case however exists, more closely resembling the one in hand, and which is indeed considerably stronger, for the control of the Courts over Ecclesiastical authorities. I refer to the King v. The Archbishop of Canterbury, in 15th *East*, 117; and the King v. The Bishop of London, in 13th *East*, 419. By the statute of 13th and 14th of Charles II., chapter 4th, (the Uniformity Act,) it is provided, that no person shall be received as a lecturer unless "he be first approved, and thereto licensed by the "Archbishop of the province, or Bishop of the diocese;" and upon an application to the Court of King's Bench for a mandamus to the Bishop of London, commanding him to receive a person duly chosen to an endowed lectureship, and a rule *nisi* granted, it was discharged, upon a preliminary objection taken, that it should have been directed to the Archbishop as well as the Bishop. We, however, who were of counsel for the rule on renewing the application, were apprehensive that the Court could not compel the Bishop to license, and therefore, only moved for a mandamus, calling upon the Archbishop, or Bishop, to admit the lecturer to trial before them, (for that was truly the substance of the application) and to license him, if he should be found a fit and proper person, to preach the lecture. The affidavits against the rule set forth, that the Bishop had repeatedly admitted the lecturer before him, and that, after having heard him, and having made diligent inquiry respecting him, he had been convinced that he was not a fit person, and for no other reason had refused to license him. A great many particular facts were set forth in the affidavit, and the Court held, that if the mandamus had issued, and if the matters on which the Bishop relied, and the statement of his having heard and inquired, had been returned to the writ, such return would have been con-

clusive, wherefore they discharged the rule and refused the mandamus.

Lord Ellenborough, in the powerful and elaborate judgment which he pronounced on the part of the whole Court, stated the authority of the Bishop to be by the statute so absolute, and the grant or refusal of a license to be so entirely within his discretion, that he might have formed his opinion even upon matters within his own personal knowledge, such as recollections of what had passed when acquainted with the party at College. Nevertheless he laid it clearly down, that if the Bishop had not inquired, — if the Court had reason to believe that he had not effectually examined and deliberated before deciding, or that any thing was defectively done in this respect, — then "the Court would interpose its autho- "ritative admonition;" that is, grant a mandamus calling on the Bishop to inquire and examine; and the whole argument really turned upon this, — whether that which had been done amounted to an inquiry and examination; it being on all hands admitted, that such preliminary inquiry, or some personal knowledge which superseded its necessity, was required, although the statute says nothing of inquiry or examination, merely giving the Bishop the power of approving; in order to the exercise of which power the Court clearly held an inquiry of some sort necessary, but left the manner of conducting it to the Bishop, as well as the decision upon its result.

So in the case of visiters, whose power and discretion is absolute, the Court will interfere by mandamus to put that power in motion, calling upon them to hear and determine, though after they have determined the Court cannot interfere, as in the case of The King *v.* The Bishop of Lincoln, 2 *Term. Reports*, 338; The King *v.* The Bishop of Ely, 5th *Term. Reports*, 475, and many other cases.

It surely never can be contended that the Presbytery are

invested with a more absolute discretion, nay, with so absolute a discretion, as these cases recognize in the Bishops under the uniformity act, and the visiters at common law; and yet the rule is clear that they will be compelled by mandamus to proceed in a court of inquiry.

It is equally clear that an action would lie at suit of the party injured by a refusal to obey the writ in such cases, as an action would also lie for a false return to the mandamus. In what respect does the action against the Presbytery differ from an action against an ordinary for refusing to hear and inquire in order to licensing, unless it be in this, that there may be no such absolute discretion vested in the Presbytery, as has been recognized in the ordinary and the visitor?

It is however contended, that the Presbytery, being a corporate body, its individual members are not answerable in an action for corporate acts of misfeasance, or of nonfeasance. To this it seems enough to answer, "that unless they are so made answerable, "there is no remedy whatever for those whom the illegal conduct "of the body may most seriously injure." There is a great laxity in the Scotch law as regards corporations. Almost any set of persons authorized in any way to act together, or continuing to act together for a length of time, seem to be regarded as a corporation. The entire merger of the individual member in the corporate existence, according to our English doctrine, may render the suing them separately difficult; and new corporations with us can only be created by statute, or by grant from the Crown. But when it is considered, that almost every Royal Borough in Scotland, and even the superiors of many Boroughs of Barony, that is, many private persons, have the power of granting what is termed "seal of cause," which creates a corporation, surely it is impossible to allow a proposition that would lead to consequences so utterly inconsistent with all good government, nay, with all social order, as those which must flow from

the notion that no individual corporator can be sued for wrongs done by the illegal conduct of the corporation, to which conduct he was a necessary party. That the whole corporate body should be liable to process and to action, as in the case of a bishop, parson, or other corporation sole, and no one member of a corporation aggregate acting wrongfully, and preventing the corporation from performing its duty, or joining in its illegal and tortious acts, — seems an inconsistent and untenable position.

But there seems no ground for the position, that even in England individual corporators cannot be sued. In the case of the King *v.* the Mayor of Ripon, in 1st *Lord Raymond*, 564, Lord Holt cited Enfield *v.* Hills, (which is also reported in 2 *Levinz.* 236, and in *Sir T. Jones*, 116,) to shew that an action for a false return lies against particular persons, a mandamus having gone to a corporation, of which it appears by the report of the same case in 2 *Levinz.* 236, the defender was a member, and he having procured the false return.

In Rich *v.* Pilkington, in *Carthew*, 171, an action for a false return to a mandamus was held to lie against the Lord Mayor of London, the return having been made by the Lord Mayor and Aldermen. And though in this case it was said that the Lord Mayor and Aldermen were not a corporation, but only a court, there can be no question that the corporate character belongs as little to the Presbytery as to such a body.

In Harman *v.* Tappenden, in 1*st East.* 559, although Lord Kenyon and Mr Justice Lawrence expressed doubts how far an action lay, yet Mr Justice Lawrence appears to hold that the action lay, if the defendants had, in their corporate capacity, tortiously procured the acts complained of to be done by the corporate body; and both he and Lord Kenyon agree, that for injurious acts wilfully and maliciously done, the corporators were liable in their individual character, though not for mere error of judgment.

Now, in the present case, that is alleged and proved which is tantamount to malice, — illegal conduct in violation of duty, and injurious to the party; and the conduct is alleged to be continued refusal to do an act declared by a judgment to be imperative. "The defenders have, from the 2d of July, 1839, and do "still illegally refuse to make trial."

In Drew *v.* Coulton, in 1st *East.* 563, and indeed, in Ashbey *v.* White, in 6th *Modern Rep.* 46, such averment seems to have been held sufficient allegation of malice. If the acts alleged to be illegal and in violation of duty, had been alleged in terms to have been wilfully done, there can be no doubt that this would have come up to an averment of malice. But the word "wilful" needs not to be used any more than the word "malice." The continued illegal refusal is clearly equivalent to wilfully doing an illegal act.

In Grey *v.* Forbes, in 5th *Clarke* and *Finelly*, 356, the individual liability of corporators appears to have been both supported by the interlocutors of the Court of Session, and sanctioned by the authority of this House upon appeal. An old case to the same effect was there referred to, The Burgesses of Rutherglen *v.* Latch, 8th July, 1747.

The Court below in giving, and this House in affirming, the decree against the majority of the Presbytery, do not incur in the present stage of this unhappy controversy, the charge so freely brought elsewhere of violating the conscience of the Church Courts and their Members. That topic has been abstained from since the answer was more than once, and in other kindred cases, given to it, respectfully suggesting, that if any individuals should find obedience to the law of the land repugnant to their conscientious scruples, they had, if not a remedy for the grievance, at least an escape from its pressure, placed within their reach, and open to them of their own free will.

But other appeals of a like nature have been made. It has

been said, that to suppose the legislature, which acknowledged the Divine origin of the Church's powers, would ever intend to enforce their exercise by the sanction of temporal penalties, is to charge that legislature with conduct as profane as it is absurd. Yet the compelling men, and bodies of men, to exercise faculties which they have received from Heaven, is one of the most ordinary acts of legislative, of executive, and of judicial power; not to mention that it is the act of ordination itself, and not the preparatory process of trial, which the Church claims to have received from above.

But when these men seek to excuse themselves, to palliate, or rather to deny their contumacy, by asserting that they only desired to consult the General Assembly, their ecclesiastical superiors, they have fallen into a much more practical error, — an error wearing a more sinister aspect, come of more base parentage, and fruitful of more dangerous offspring. "We "had," say they, "on the one hand the opinion of the civil "court; on the other the positive injunctions of our ecclesiastical "superiors, and all we did was to refer to them for advice." Advice on what point? In what difficulty — touching what nice and perplexed matter — involved in what entangled controversy was it, that they required such a resort for light and help? No less nice, and difficult, and perplexing a question, than whether they were to perform the duty in terms declared to be incumbent on them,—declared by the supreme tribunals of their country;—or to follow the advice of other persons who had set themselves in opposition to the tribunals, and had commanded or enjoined them to disobey their decrees. And to whom do they resort for advice in this emergency, for a solution of this difficulty? Not to any impartial and unbiassed adviser, whose counsels it would be safe to follow, but to the party whence had proceeded the unwholesome advice to disregard the law. It is fit that these men learn at length the lesson of obedience to the tribunals which

have been appointed over them; a lesson which all others have long acquired, and which they, on learning it, should also practise. It is just that they should make reparation to those whom their breach of a plain duty has injured. The duty is not doubtful; the Courts have laid it down. Their failure is not a mistaken opinion; their fault is not an error of judgment. They knew what they ought to have done, and they refused to do it. The penalty of their transgression is to make compensation to those whom they have injured by their pertinacious refusal to perform their duty, and yield obedience to the law.

Lord Cottenham. — My Lords, I feel much satisfaction at finding that this case has been so deeply considered, and so fully discussed by the noble and learned lords who have preceded me. A very few sentences will be sufficient to express the grounds on which I concur in the opinions which they have stated to your Lordships, and upon which I consider that the interlocutors appealed from should be affirmed.

My Lords, I have not found during this discussion any real difficulty as to any of the propositions which were raised by the appellants at the bar. The principal ground of defence which the defenders relied upon was, that they were exercising certain judicial functions which, as a court, they were competent to exercise; and that therefore they were not liable if they had fallen into any error in the exercise of those judicial functions. My Lords, the interlocutor in the Auchterarder case, affirmed by this House, entirely excludes any such ground of argument. They indeed assumed in that case, as they have in this, that the law had reposed in them some discretion as to whether they should or should not take the party duly presented upon his trial. The interlocutor of the Court of Session decided that they had no such discretion, but that it was their bounden duty to do so; that they had no option; that it was a right which the

party presenting was entitled to claim as against them; a public duty which they were bound to perform.

That then must be considered as the declared law of the land. In violation of that right, and in disobedience to that law, the proceedings in this case shew, that the Presbytery have refused to do that which, by that decision of the Court, they were bound to do. The result is an injury accruing to the party who claims to be at least entitled to be examined, for the purpose of its being ascertained whether he was a person fit to be received into that piece of patronage for which he had been presented to the Presbytery.

Then if that be removed, the only other ground which was even open for argument was, that although that might be so, although the law had so declared, yet that they were not individually answerable for the course which had been adopted by the Presbytery at large; that is to say, that the individual members of the Presbytery were not liable for that which was the act of the body of which they formed a part.

My Lords, when the authorities in this country, but more particularly in Scotland, were examined, it appeared that there was no foundation whatever for that ground of defence. My noble and learned friends have referred to cases which have arisen in this country, but those which they have referred to as having been decided in Scotland are of course much more applicable to the present case.

We have had in this House, instances of actions brought against persons standing in the situation of trustees, for acts of omission on their part. And the case which my noble and learned friend on the woolsack referred to, meets that objection to which I have last referred in its very terms. In the case of the Magistrates of Edinburgh, there was a duty to be performed; they had neglected to perform that duty, (and it is certainly not a less strong way of putting it where there is a positive refusal to

perform it;) from the neglect of duty by those Magistrates of Edinburgh, an individual had sustained damage, and he brought his action, and sought his remedy against the individuals, and it was held, that he had a right so to do. Similar decisions have taken place in other cases, in this country.

Then, my Lords, if there has been a wrong sustained, if that wrong has arisen from the body of which these individuals form a part, having refused to do that which the law has stated they are bound to do, and damage has been sustained by an individual in consequence; and if, in such cases, the law be that the individual members are all answerable in their own persons for the damage and injury so sustained, the whole case is exhausted, and the propriety of the interlocutor appealed from, is established.

My Lords, there has not in my mind been raised any doubt as to the law applicable to these several branches of the case; and I have no hesitation in stating my opinion to be, that the interlocutor ought to be affirmed.

Lord Campbell. — My Lords, I am likewise of opinion, that this interlocutor ought to be affirmed. The action is brought to recover a compensation for the loss which it is alleged the pursuers have sustained by reason of the defenders having refused to perform a duty cast upon them by act of Parliament, and the decree of a Court of competent jurisdiction.

Lord Kinnoul, the undoubted patron of the parish of Auchterarder, in due form presented to the living Mr Young, a preacher of the gospel, but not in holy orders. The presentation being intimated to the Presbytery, they refused to take Mr Young on trials, because a majority of the male heads of families in the parish in communion with the church, disapproved of the presentation. An action was then brought by the patron and presentee against the Presbytery, with a view to enforce upon them the performance of their duty — to take the presentee on trial — that

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they might judge whether he was duly qualified to be ordained and inducted. In that action, it was found and adjudged by the Court of Session, "that the defenders, the Presbytery of Auchterarder, did refuse, and continue to refuse to take trial of the qualifications of the said Robert Young, and have rejected him as presentee, on the sole ground that a majority of the male heads of families, communicants in the said parish, have dissented, without any reason assigned, from his admission as minister; and that the Presbytery, in doing so, have acted to the hurt and prejudice of the pursuers, illegally and in violation of their duty, and contrary to the provisions of the statutes libelled on." The Presbytery having appealed against this interlocutor, it was affirmed by this House.

The judgment of your Lordships was to be applied by the Lord Ordinary, who pronounced a judgment, finding and declaring, "That the Presbytery, and the individual members thereof, are still bound and astricted to make trial of the qualifications of the pursuer, Robert Young; and if in their judgment, after trial and examination in common form, he is found qualified, to receive and admit him minister of the parish, according to law." This judgment of the Lord Ordinary, against which there was no appeal, was duly intimated to the defenders, who are members of the Presbytery of Auchterarder, at a meeting of the Presbytery; and they were requested to take Mr Young on trial accordingly, but they refused to do so, and referred the matter to the Commission of the General Assembly. In consequence, Mr Young has never been taken on trial, or admitted as minister of the parish, and has lost the profits of the living.

On these facts, my Lords, I am of opinion, that this action is well brought. I conceive, that by the law of Scotland, as well as by the law of England, and I believe by the law of every civilized country, where damage is sustained by one man from the

wrong of another, an action for compensation is given to the injured party against the wrong-doer.

In this case, if there be injury, there seems to be no doubt of the damage, for Mr Young is thereby deprived of the status of minister of Auchterarder, together with the temporalities of the living. The patron likewise must be considered as suffering a damage, for which he is entitled to compensation, if there be an illegal refusal to admit his presentee, in violation of the rights conferred upon him both by common and statute law.

My Lords, is it not equally clear, that the defenders were guilty of a wrong when they refused to obey the law, as declared and adjudged by the Court of Session, and this House? The duty of taking on trial, and admitting if duly qualified the presentee of the lawful patron, was cast upon the members of the Presbytery, who ought to have been aware of that duty, when they themselves being presented by the patrons of their respective parishes, were taken on trial, and admitted members of the Presbytery. They ought to have been aware, that while they continued members of the Presbytery, they could not get rid of the duties incumbent upon them in that capacity. They might have known that the law of the land affecting the civil rights of the lieges, can only be altered by the legislature, the supreme authority in the state. The rights of patrons, recognized by the most ancient and venerable authorities in the law of Scotland, are anxiously guarded by the Acts of Parliament, establishing the Reformed Presbyterian Church of Scotland; and by the Act of 10th of Anne, chapter 12, which we must consider binding, although it has been said to be *ultra vires* of the British Parliament, it is expressly enacted, "That the Presbytery of the bounds "shall receive and admit such qualified person minister, as shall "be presented by the patron."

But whatever doubt may be supposed to have existed, was removed by the solemn judgment of the Court of Session and of

this House; and the Lord Ordinary was unquestionably authorized, in pronouncing the interlocutor, whereby the defenders must be considered to have been required to make trial of Mr Young's qualifications, and if he were found qualified, to admit him minister of the parish. The refusal to obey the lawful decree of a court of justice is certainly a wrong. We have here therefore the conjunction of wrong and loss; — of wrong committed by the defenders, and loss suffered by the pursuers, out of which an action arises, and *primâ facie* the action is maintainable.

I will now consider the several objections to the action brought forward on the part of the appellants.

In the first place, it is said, that the Presbytery is a Court, and that this was a judicial proceeding, wherefore, no action can be maintained against the members of the Court, although their judgment be erroneous. There can be no doubt that for many purposes the Presbytery is a Court, and that it has not only ecclesiastical functions, but jurisdiction in certain civil matters, such as the allotting of glebes, and the repairs of kirks and manses. Where the Presbytery is acting judicially, or in any matter where they have a discretion to exercise, no action could be maintained against the members; at least, without malice expressly charged, and clearly proved. If they had taken Mr Young on trial, and adjudged that he was not qualified, from being *minus sufficiens in literaturâ*, or from any objection to his orthodoxy or his morals, or that from some personal defect he was incapable of satisfactorily serving the cure, their judgment could not have been reviewed by any civil court, and certainly no action would have lain against them, on the allegation, that in truth he was well qualified and free from all objection. The church judicatories, acting within their jurisdiction, must ever be respected and upheld. But when the Presbytery were required to take Mr Young on trial, in my opinion they were required to do a mere ministerial act. Touching that act, — they had no dis-

cretion, they had no judgment to exercise. How then could it be judicial? There is no difficulty whatsoever in separating the act of appointing him to appear before them to be examined, and the act of forming a judgment upon his qualifications when he has appeared before them and been examined. It is for a refusal to do the first act that this action is brought, and the first act is purely ministerial.

Where there is a ministerial act to be done by persons who on other occasions act judicially, the refusal to do the ministerial act is equally actionable, as if no judicial functions were on any occasion intrusted to them. There seems no reason why the refusal to do a ministerial act, by a person who has certain judicial functions, should not subject him to an action in the same manner as he is liable to an action for an act beyond his jurisdiction. The refusal to do the ministerial act is as little within the scope of his functions as judge, as the act where his jurisdiction is exceeded. In the act beyond his jurisdiction he has ceased to be a judge. As to the ministerial act which may be initiatory to a judicial proceeding, he is not yet clothed with the judicial character.

In the able argument on behalf of the appellants at the bar, it has hardly been denied that the action is maintainable, if the act to be done was of a ministerial nature; for the general proposition, that public functionaries appointed to act ministerially, are liable to an action at the suit of any one who suffers damage from their breach of duty, was not disputed. Every thing, therefore, turns on the quality of the act; and how is the act of the Presbytery, in taking the presentee on trial, to be distinguished from the act of the archdeacon, or of the bishop in inducting to a living? The archdeacon and the bishop have both judicial functions, but in inducting to a living where the right is ascertained, they have to do a ministerial act, and for wrongfully refusing to do that act, the law gives an action to recover damages against them, to the parties aggrieved.

At common law, there were no damages in *Quare Impedit*, because this was in the nature of a real action, to try the right of advowson; but for a refusal to admit, after a judgment in *Quare Impedit*, I have no doubt that damages might have been recovered at common law.

Is there not a ministerial duty cast upon the Presbytery by 43 George III., chapter 54, section 16, to take a person elected parish schoolmaster on trial, as to his sufficiency for the office, in respect to morality, religion, and literature; and would not a person so elected, have a remedy against the members of a Presbytery, who refused so to do, whereby he could not be admitted to his office?

The members of Presbytery need not feel their dignity hurt by this doctrine, for I humbly apprehend, it would apply to the supreme Judges of Scotland, the Senators of the College of Justice. By the Scots statutes, 1579, chapter 93, and 1592, chapter 134, it was enacted, that "when the place of any ordi-" nary Lord of Session became vacant, the Crown was to present " and nominate a man that feared God, of good literature, and " other qualifications enumerated; who should be first suffi-" ciently tried and examined by the Lords of Session, and in " case the person presented should not be found so qualified by " them, it should be lawful to the said Lords to refuse the per-" son presented to them, and the King's Majesty was to present " another, so oft as he pleased, till the person presented were " found qualified."

After the case of Haldane, in *Robertson's Appeal Cases*, 422, who in 1722, being appointed a Lord of Session by the Crown, was rejected by the Court as disqualified, but found on appeal to be well qualified by this House, the British statute of 10th George I., chapter 19 passed, by which the examination of the person nominated judge, by the Judges of the Court of Session, is continued, and if the person so nominated, shall, on such examination, be found duly qualified, then they shall forthwith

admit and receive him; but if they think there is just ground to object to the qualifications of the person so nominated, they are to lay the whole matter before the king, who may either order him to be admitted, or may nominate another in his place.

The trial is still necessary, and, as is well known, the judge appointed by the Queen's letter, must first give proof of his learning and skill as Lord Probationer, before he takes his place on the bench, and is admitted as a member of the Court. During the present session, your Lordships have had the advantage of having laid before you, two most excellent experimental judgments by Lord Probationer Ivory, and Lord Probationer Murray.

Now, my Lords, if we may conceive, (what can never happen,) that the Judges of the Court of Session should pass an act of sederunt, to the effect, that Judges ought not to be intruded on the College of Justice, and that the Court would not take on trial any one appointed by the Crown to be a judge, if a majority of the Advocates and Writers to the Signet practising in the Parliament House, should, without assigning any reason, dissent to the appointment, and afterwards putting the veto act in execution, should, on the sole ground of the dissent, refuse to take on trial a person duly appointed a Judge of the Court by the Queen's letter — still more, if upon appeal to the House of Lords, this veto act being adjudged to be illegal, null and void, there should be a declaration by this House, that the Judges of the Court of Session were bound and astricted to take the party on trial, and they were still positively to refuse to do so, — I cannot doubt, that having been thereby guilty of a breach of the law, they would be liable in an action to make reparation in damages to him who had suffered a loss from their wrong. Of law, I hope it may ever be said, with truth in this country, "all things "do her homage; the very least as feeling her care, and the "greatest, as not exempted from her power."

But it is said, that this action is an interference with the right of the Church, to confer holy orders. God forbid that a Civil Court should exercise a judgment as to whether any one is qualified to preach the gospel, or to administer the sacraments! But I entertain no doubt as to the jurisdiction of Civil Courts, to command the proper Ecclesiastical Authorities to inquire whether a person is so qualified, who, if he be so qualified, is entitled by law to a certain *status* in the Church, and if they find him so qualified, to do what is necessary to enable him to enjoy his preferment.

By the act of uniformity, 13th and 14th Charles II., chapter 4, section 19, no one may preach as lecturer in any church, unless he be first approved, and thereunto licensed by the archbishop of the province, or the bishop of the diocese. Can the archbishop and bishop refuse their license as they please? No. The Court of King's Bench will compel them to grant a license to a person appointed to a lectureship, or to give a sufficient reason why they refuse to do so.

In the case of the King *v.* the Churchwardens of St Bartholomew, in 12th William III. reported in a note in 13th *East.* 421, it was held by Salt, Chief Justice, "That though it was punish-"able by the statute for any person to be lecturer, and preach "without license, yet the ordinary had no power over the right, "nor has he an arbitrary power to license or not, but was bound "*ex justitiâ* to license if the person were orthodox, an honest "liver, and loyal."

So, upon an application for a mandamus to compel the bishop to grant a license under the act of uniformity, Lee, Chief Justice, said, "There can be no question but this Court hath jurisdiction "in all cases of this nature, but the question is, whether this be "a proper case for the Court to exercise that jurisdiction? "Where a person appears to have a right, this Court will com-"pel the bishop to grant a license, or shew good reason to the

" contrary." In the King *v.* Blower, 2 *Burr.* 1043, Lord Mansfield said, " If the bishop had refused, without cause, to " license him, he might have had a mandamus to the Ordi- " nary, to compel the Ordinary to grant him a license."

In the King *v.* the Archbishop of Canterbury, and the Bishop of London, in 15 *East.* 117, which was referred to by my noble and learned friends, Lord Ellenborough lays down the law upon this subject with his usual force and perspicuity. — " The bishop has " not an arbitrary power of refusing a license, but he must exer- " cise his discretion fairly upon the fitness of the person applying " to him *secundum æquum et bonum.* Suppose he should return " *non idoneus*, generally, can we compel him to state all the par- " ticulars from whence he draws his conclusion? Is there any " instance of a mandamus to the Ordinary to admit a candidate " to holy orders, or to specify the reasons why he refused? If, " indeed, it had appeared that the bishop had exercised his juris- " diction partially, or erroneously; if he had assigned a reason " for his refusal to license, which had no application, and was " manifestly bad, the Court would interfere."

In that case, the rule for a mandamus was discharged on an affidavit by the Bishop, that the party applying had been admitted to his presence with a view to his being approved and licensed; that he had made diligent inquiry concerning his conduct and ministry, and being convinced from such inquiry, that he was not a fit person to be allowed to lecture, he had conscientiously determined, after having heard him, that he could not approve or license him.

The English authorities differ as to whether the Bishop is bound to specify his reasons, it having been held in Specots' case, reported by Lord Coke in 5th *Reports*, 57, that he must; but they all agree, that if an insufficient reason is assigned, he may be compelled to proceed to do the acts as Ordinary, which are necessary to enable the party, with the inchoate right, to enter into full possession of the benefice.

So, if the Ecclesiastical Court, in a process of deprivation, is proceeding within its jurisdiction, to deprive for what would be just ground of deprivation; as immorality, heterodoxy, or disobedience to the Canons of the Church, no civil Court would interfere, and an erroneous judgment would only be ground of appeal to a superior Ecclesiastical Court. But Free v. Burgoyne, 5th *Barnewall* and *Cresswell*, 538, and in 8 *Bligh*, 65, shews that prohibition will be granted by the Civil Courts, if the Ecclesiastical Courts are proceeding to deprive for that which is not just cause of deprivation, and a sentence of deprivation, shewing *ex facie*, that it was founded on that which would not be just cause of deprivation, would be a nullity.

All proper respect is to be shewn to Ecclesiastical authority; but authority must be defined, or despotism would be established, and true religion would be sacrificed to the ambition of those who delude themselves into the belief, that they are consulting its best interests.

The counsel for the appellants strongly urged, that they were only liable to be dealt with criminally, for what was acknowledged to be disobedience to the law; and it was assumed, that in England, no action would lie from a refusal to obey a mandamus. The common remedy is certainly by attachment, because it is more speedy and more effectual. But I by no means agree to the position, that if after a mandamus ordering an act to be done, or cause shewn to the contrary, and a return made, being set aside as insufficient, an absolute mandamus were to go and to be disobeyed, an action would not lie. Suppose a mandamus to churchwardens, to make a rate under the Church Building Act, for the purpose of paying off a debt charged upon the church rates, it might be no remedy to the creditor merely to put the churchwardens in prison, but an action would enable him to get at their property, and according to all principle and analogy, such an action is maintainable. Where an award is made under a rule of Court, there may be an attachment for the contempt, or an

action for non-performance of the award. The rule propounded by the Attorney General that there is no mandamus where there is an action, and no action where there is a mandamus, is not universal, and at any rate applies only to the original grant of the mandamus, and not to the remedy for disobeying it. Although there might be a charge of horning against these defenders for disobedience to Lord Murray's interlocutor, no authority has been cited to us to shew, that an action to be repaired in damages is incompetent.

The difficulty pointed out, of finding on which side the different members of the Presbytery voted, would apply to a criminal as well as a civil proceeding; for those members of the Presbytery who were desirous of obeying the law, could not be liable to punishment, and it would be incumbent on the prosecutor to shew who were contumacious. It seems strange to make this objection, when the defenders admit on the record, that they were members of the Presbytery of Auchterarder, and that they refused to take the presentee on trials. I must observe, likewise, that the action is not brought for the act of the majority, but against each defender for his own *delict*, from which damage has accrued to the pursuers.

This reasoning answers the objection, that the Presbytery are not sued as a body. It would have been preposterous to have sued the Presbytery as a body, or to have made the Presbytery as a body, co-defenders with the individual members sued. Proceedings may be taken against the Presbytery as a body, to compel them to do an act, which as a body they must do. But as a body, they cannot be sued *ex delicto*. Suppose a Court is constituted of a single judge, if an action is brought against him for any excess of jurisdiction, he is not sued as a judge, but as an individual who assumed to act without authority. If the court consisted of several who concurred in the act, they would likewise be sued as individuals, and those only are to be sued who

concurred in the act. The action is not against the court, but against individuals who have committed a wrong; so if the members of the Court are required by law to do a mininisterial act, and they refuse, the wrong is by the refusing individuals, and against them only is the remedy. Each dissenting member of the Presbytery would have been guilty of a wrong, even if a majority had taken the presentee on trial. But that would have been a case of *injuria absque damno*, and no action would have arisen; but when there is a conjunction of wrong and damage, the injured party may, at his election, sue the whole or any portion of the wrong-doers.

Next, it is said, the summons is bad, as it contains no allegation of *malice*. Where the judge of an inferior court, acting within his jurisdiction, from corrupt motives, gives a wrong decision, malice is the foundation of any action against him, and malice must be alleged and proved. But this action is for a refusal to do a ministerial act, and the summons shews that the defenders have committed a wrong, which has worked damage to the pursuers. I must likewise observe, that malice, in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law, to the prejudice of another. The facts charged and admitted in this case, amount to a deliberate disobedience of the law of the land, the necessary consequence of which is a prejudice to the pursuers, and it is a well-established maxim, that every one must be taken to intend the necessary consequence of his deliberate acts.

Then we are told "that the action cannot be maintained "because there was no mandate in the original interlocutor of "the Court of Session, affirmed by this House, or in the last "interlocutor of the Lord Ordinary, from which there was no "appeal, and that without a mandate the Presbytery were at "liberty to refer the matter to the General Assembly." I conceive that the declaration, that "the refusal of the Presbytery to take

" the presentee on trials was illegal, and in violation of their duty; " and that they were bound and astricted to take him on trial, " and if found qualified, to admit him minister of the parish," is equivalent to a mandate to that effect. The duty being declared to do a specific act, the law commands that it shall be done. The reference to the General Assembly, was, under these circumstances, a mere evasion, and tantamount to a direct refusal; it may be likened to the resolution of a vestry to adjourn for a year, when a motion has been made for a church rate, which has been clearly held to amount to a refusal to grant any rate. The reference to the General Assemby, the authors of the veto law, adjudged to be invalid, was a mere defiance of the Courts which had pronounced that judgment.

Perhaps I ought to notice the argument, " That, at all events, " this is a case of *injuria absque damno*, because the patron is in- " demnified by the vacant stipend; and the presentee, with respect " to the temporalities of the living, (which alone can be the subject " of compensation,) till in holy orders, has neither *jus in re*, nor " *jus ad rem*." But without at all considering the question, whether the patron, under the circumstances, is entitled to the vacant stipend, or the uses to which it is to be applied, this boon never could be given to him as a satisfaction for the wrongful act of the presbytery in violating his right of patronage, and cannot be considered the measure of the damage which he thereby sustains. As to the presentee, he is debarred from his status as minister of the parish of Auchterarder, to which, in the absence of all objection to him, we are bound to suppose he is entitled, together with the profits of the living.

The doctrine has been hinted at by the counsel for the appellants, rather than explicitly announced, that the spiritual office of minister of a parish in Scotland may be entirely separated from the temporalities, and that the church renouncing the temporalities may dispose of the spiritual office as they please. To

this doctrine, I for one, beg leave to express my dissent. By the law of the land, in framing which the church was a party, the temporalities are united to the spiritual office, and this office with the temporalities is to be enjoyed by the person duly qualified presented by the patron, the church being the sole judges of his qualifications. There is a civil right to this office, which the civil courts will recognize and vindicate. A renunciation of the temporalities of the church, with a view to retain spiritual jurisdiction, cannot be made by those who continue members of the Establishment.

But the defence is explicitly and broadly put forth, that the defenders are bound by the veto law, and not by the decrees of the Court of Session, or of this House, because "they have "come under the most solemn obligations to conform themselves "to the discipline of the church, and the authority of its several "judicatures."

My Lords, it is impossible not to respect those who are actuated by the construction they conscientiously put upon an oath, however erroneous it may be. But, my Lords, it is my duty to say, that all oaths of obedience to superiors are attended with the implied condition that their commands are lawful. From the time of St Thomas-a-Becket till now, there has been no such pretension in any part of this island, as that ecclesiastics, in the exercise of a *liberum arbitrium* inherent in them, are, of their own authority, conclusively to define and declare their own power and jurisdiction, and that no civil tribunal can call in question the validity of the acts or proceedings of any ecclesiastical court. In the most palmy days of Popery in England if "the Courts "Christian" exceeded their jurisdiction, as if they were seeking to enforce an unlawful canon, instead of appealing to the Archbishop or to the Vatican at Rome, an application was made to the Courts of Westminster Hall for a prohibition, the prohibition was granted, and the law would easily have vindicated its dignity

if the Bishop, had insisted on proceeding in the face of the prohibition. I am not aware that the Roman Catholic Church in Scotland claimed a higher exemption from civil authority than the Roman Catholic Church in England, or that the founders of the Reformed Presbyterian Church in Scotland claimed a higher exemption from civil authority than the Roman Catholic Church to which it succeeded.

The controversy out of which this action springs depends upon the construction of certain Acts of Parliament which regulate and protect the rights of patrons. It is surely for the supreme court of this empire to put a construction upon those acts. Having done so, and declared the veto act to be illegal and void, can the defenders be heard afterwards to say that they are still ordered by their ecclesiastical superiors to be guided by the veto act, and that they are bound to obey their ecclesiastical superiors?

Finally, we were much pressed with the hardship to which the appellants are exposed, by being held liable to actions for acting according to their consciences. I do not think, my Lords, that where the law is clear, the hardship of being obliged to obey it is a topic that can be listened to in a court of justice. There can be nothing more dangerous than to allow the obligation to obey a law to depend upon the opinion entertained by individuals of its propriety, that opinion being so liable to be influenced by interest, prejudice, and passion, — the love of power, still more deceitful than the love of profit, — and that most seductive of all delusions that a man may recommend himself to the Almighty by exercising a stern control over the religious opinions of his fellow men. The danger of setting conscience against law has been recently illustrated, both in Scotland and in England, by the refusal, on the score of conscience, to pay contributions for the maintenance of the clergy and the Church, which the law has enjoined. Whilst the appellants remain members of the Establish-

ment, they are, in addition to their sacred character, public functionaries appointed and paid by the state, and they must perform the duties which the law of the land imposes upon them. It is only a voluntary body, such as the Relief or Burgher Church in Scotland, self-founded and self-supported, that can say they will be entirely governed by their own rules.

In conclusion, my Lords, I hope I may be permitted to express my heartfelt grief at the unfortunate course which the appellants have pursued, in resisting the authority of the Court of Session and of this House, to enforce the acts of the legislature. The son of a minister of the Church of Scotland, and reared in her bosom, I have ever professed and felt for her the deepest veneration and the warmest affection. I believe that no church ever more effectually attained the great ends of an Establishment, in instructing the people in the truths of religion, and edifying them by its consolations. I believe it is mainly owing to the ministrations of her clergy that the mass of the inhabitants of Scotland have been so remarkable for orderly, industrious, and pious habits. I earnestly wish permanence and prosperity to her, and that she may dispense the blessings of the true faith to distant generations. But for this purpose her present members must respect the supremacy of the law, as their predecessors have done, and it can be no disparagement to them to follow such illustrious examples as Moncrieff and Erskine, Robertson and Blair.

If there be any acts of Parliament on the statute book which are supposed to stand in the way of salutary reform in the Church, let there be an application to Parliament that they may be modified or repealed, and I am sure that it will be received with the highest respect for the applicants, and the most sincere desire to comply with their wishes. But a defiance of courts of justice and of the legislature inevitably leads to confusion and mischief, and a perseverance in such ill advised counsels must either end

in the total subversion of the establishment, or in a schism which would for ages impair its respectability and usefulness.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of, be affirmed with costs.

SPOTTISWOODE and ROBERTSON — RICHARDSON and CONNELL, Agents.

[Heard 11th *March* — Judgment 9*th August*, 1842.]

FRANCIS HAMILTON, Esq. *Appellant.*

MARY HAMILTON, JENNET HAMILTON, JAMES HAMILTON, and ARCHIBALD HAMILTON, and JAMES BOOG, *curator ad litem* to the said James and Archibald Hamilton, *Respondents.*

Marriage. — Circumstances adduced to prove marriage by habit and reputation, *held* not to establish a habit and reputation of that general and uniform character which is necessary to constitute marriage.

Ibid. — Circumstances *held* to prove, that a letter, purporting to be an acknowledgment of marriage, had been seen and assented to by the woman, and to constitute a marriage between the parties, notwithstanding evidence of another purpose on the part of the man previous to making the letter.

Ibid. — *Writ.* — *Trust.* — Delivery to a third party of a letter acknowledging marriage, the letter having been seen and assented to by the woman, makes the third party trustee for the woman, and is equivalent to delivery to herself.

IN December, 1835, the appellant, as the immediate younger brother-german, and heir apparent of the deceased Archibald Hamilton, who had been a surgeon in the army in the outset of life, but on his retiring from the army, had taken up the business of a pawnbroker, brought an action against the respondents, who were the children of Archibald Hamilton, setting forth, that as heir-at-law to Archibald Hamilton, he was about to make up titles to him, but was precluded from getting access and inspection into his papers and titles, and otherwise interrupted in making up his titles, as heir aforesaid, by the respondents. That the deceased, after serving in the army as surgeon, came

to reside in Edinburgh, in or about the year 1811, and continued chiefly to reside there till his decease, which happened at Edinburgh, on or about the 23d day of February, 1823. That within that period, the respondents were born of May Clark, the servant or housekeeper of the deceased, and it was alleged by them that the deceased was their father. That the deceased was never married to May Clark, nor were he and she habit and repute husband and wife; but she, in so far as she was known to be connected with the deceased, was known only, and declared by himself to his friends and acquaintances, to be a person with whom he lived in illicit intercourse, and as the mother of the said children. That the deceased was always known and held and reputed to be an unmarried man, down to the period of his decease, and was buried as an unmarried man. That the respondents were bastards, or, at least, were not the lawful children of the deceased, and were never legitimated, and had no title to any of the civil rights which would have been competent to his lawful children; and concluding, "that it should be declared, that the respondents were bastards, "or, at least, not the lawful children of the deceased, — their "mother, May Clark, never having been married to him, — and "that, therefore, they had no title to any of the legal or civil "rights which would have been competent to his lawful children."

The respondents, in defence, denied the statements of the summons, and averred, "That in 1814, Archibald Hamilton "left the army, and from that time till his death, he and their "mother, May Clark, resided constantly in Edinburgh. That "they lived in lodgings till 1816, when they took a house in "Brown Street, where they remained till 1820. That they "then removed to a house in Crosscauseway, where they stayed "for two years, after which they went to a house in St Leo-"nards, where they continued to reside till Mr Hamilton's "death, which happened on the 23d February, 1823. That

" during all this period they cohabited together in all respects " as man and wife, and were visited and acknowledged as such, " by numerous neighbours and acquaintances. That in 1817, " he granted their mother a letter, dated the 26th of September " of that year, containing a solemn acknowledgment and declara- " tion of his marriage, but adding a wish, that it should be kept " private for the present. That the only reason of this was, an " apprehension that some of his friends, and some members of " his family, might be dissatisfied with the marriage, inasmuch " as Mrs Hamilton was a person in an inferior condition of life; " on which account it was that he did not introduce her generally " to his relations, but lived in a manner comparatively retired. " That several members of his family were, however, aware of " the marriage, and many other persons, not of the family, fre- " quently visited in the house, and had access to know the terms " on which they lived together. That their marriage was avowed " to these persons; and that they acknowledged each other as " man and wife, and in all respects lived together and acted as " such, and were received and treated as such by those who " knew and visited them."

Condescendence and answers were ordered; and when the respondents lodged their revised answers, they produced, at the same time, the letter referred to in their defences, which was in these terms: —

" *Edinr. September* 26, 1817.

" MY DEAREST MAY, — I hereby solemnly declare that you " are my lawful wife, tho', for particular reasons, I wish our " marriage to be kept private for the present. I am, your affec' " husband. AR. HAMILTON."

" *To* MAY CLARK."

(*Addressed on the back.*)

" *Mrs A. Hamilton, Brown Street, Pleasance.*"

HAMILTON *v.* HAMILTON. — 9th August, 1842.

After the record was closed, a proof was led by both parties. From this evidence it appeared, that the original connection between the father and mother of the respondents commenced sometime between the years 1810 and 1814 — that their mother lived in lodgings in the Canongate of Edinburgh until 1817; and while living there, gave birth to the respondents, Mary and Jennet Hamilton; but whether their father lived with their mother during this period, or only occasionally visited her, did not appear. That in 1816 the kirk-session of the Canongate presented a petition to the magistrates, alleging, that the respondents, Mary and Jennet, were illegitimate, and praying that the mother might be examined as to who was their father, with the view of preventing them from being chargeable to the parish. That the father of the respondents gave bond with Major John Lindsay to the kirk-treasurer of Canongate, that the respondents, describing them as "two natural children born by Mary Clark," should not be chargeable to the parish. That in the year 1817 the father of the respondents took a flat of a house in Brown Street, Edinburgh, where he went to reside, and continued to reside, with their mother, until 1820, and during their residence there, the two respondents, James and Archibald, were born. That in 1820 the father took a house in the Crosscauseway of Edinburgh, and remained there until 1822, when he took another house at St Leonards, in which he continued to live until his death, which happened on the 23d February, 1823, and that during his residence in the Crosscauseway and at St Leonards, as during his residence in Brown Street, the respondents and their mother lived in family with him.

The evidence led had regard to the two grounds of defence set up by the respondents: — 1st, Marriage of their parents by cohabitation, and habit and repute, during the period subsequent to their going to reside in Brown Street. 2d, Marriage by the letter of 26th September, 1817.

I. Marriage by cohabitation and habit and repute.

Of several witnesses examined for the pursuer, (appellant) Lieutenant General Hope deponed, that he "was intimately acquainted with the late Archibald Hamilton, sometime surgeon in the 92d regiment of foot. That the deponent was acquainted with Mr Archibald Hamilton up to the period of his death. That it was generally reported, and understood among his friends, that Mr Hamilton kept a mistress, by whom he had a family; but that, to his knowledge, the deponent never saw her, and never knew her name. But he understood it was the same person who, subsequently to Mr Hamilton's death, applied to the deponent for a certificate to obtain the government pension. That he never had any information on the subject from Mr Hamilton himself. That the deponent was intimately acquainted with the late Major Lindsay, who was brigade-major to the deponent: That the said Major Lindsay and Mr Archibald Hamilton were for many years on terms of great intimacy, down to the period of Mr Hamilton's death: That said Major Lindsay died at Madras four or five years ago: That Major Lindsay attended Mr Hamilton during his last illness, which lasted only a few days. Depones, That Major Lindsay had often spoken to the deponent regarding the mother of the defenders, and as to Mr Hamilton having had children by her; but he did not speak to the deponent of her as being Mr Hamilton's wife. Interrogated, In what character Major Lindsay spoke of the defenders' mother? answers, 'Merely as 'a person who lived with him.' Interrogated, Whether, 'by a 'person who lived with him, he understood Major Lindsay 'to mean that she was his mistress?' answers, 'I understood 'so.' Whether the deponent thinks, that if Mr Hamilton had made a low or disreputable marriage, Mr Hamilton would have mentioned it to him? Depones and answers. No; I do not think he would. Interrogated, Whether he thinks that Mr Hamilton would have refrained from doing so from a desire of retaining the deponent's good opinion? Depones, That he

" has no doubt he had that desire. Depones, That Mr Hamil-
" ton was known to Lady Hope and the other members of
" the deponent's family, and was received as a visitor at his
" house."

Edward Bruce, a retired merchant, deponed, " That he was inti-
" mately acquainted with the late Dr Archibald Hamilton, and that
" the intimacy commenced about 30 years ago, when the deponent
" was a boy about 14 years of age. Interrogated, If he under-
" stood that Dr Hamilton, after his return to Edinburgh, kept
" a mistress? Depones, That he did so understand: That the
" deponent used to joke Dr Hamilton about it, and he laughed
" in return and never denied it. Depones, That it was gene-
" rally known and talked about among his friends. Interrogated,
" Depones, That he understood that it was the same person
" whom the Doctor all along kept up as his mistress, and that
" the connection continued down to the Doctor's death. Inter-
" rogated, if he knew that the Doctor had a family by her?
" Depones, That he did. Depones, That he has seen a
" person in the street who was pointed out to him as the indi-
" vidual who was kept by Dr Hamilton, and that he frequently
" saw her afterwards, but she was not pointed out by Dr
" Hamilton himself. Interrogated, If he ever heard or under-
" stood that Dr Hamilton had married the foresaid person?
" Depones, That he never did; and farther depones, That the
" Doctor never expressed to him in conversation any intention
" of marrying the above individual, nor did he ever hear it
" whispered or surmised among the Doctor's friends or acquain-
" tances, that any such lawful connection between the parties
" had been formed. Interrogated, Depones, That, from the
" intimacy which the deponent had with Dr Hamilton and his
" family, he really thinks he would have informed the deponent
" had he entered into any such connection with the foresaid
" person; and the deponent adds, That he was so much in the
" habit of joking the Doctor about her as his mistress, that he

" thinks the Doctor would have taken the opportunity of check-
" ing him, and mentioning that he was married to her, if that
" had been the case. Interrogated, depones, That it was the
" deponent's firm belief that Dr Hamilton died an unmarried
" man, for he had never heard, till after his death, that the
" person referred to claimed to be his wife, and when he did
" hear this, he was quite astonished. Interrogated, How long
" it might be after Dr Hamilton's death till he heard of the
" claim? Depones, That it would be a good while after it, and
" he daresay it might be about a year. Cross-interrogated for
" the defenders, Whether, when the deponent was joking Dr
" Hamilton about his mistress, the Doctor made any answer in
" words? Depones, that he does not think the Doctor would
" make any specific answer about it, but he would probably say,
" 'Bruce, you are a terrible fellow,' or words to that effect.
" Interrogated, Depones, That the Doctor never said to the
" deponent in plain terms, either that he had a mistress or that
" he had not. Interrogated, If the Doctor was in the habit of
" communicating much with the deponent about his private
" affairs? Depones, and answers, Oh no. Interrogated, De-
" pones, That he does not remember any instance in which the
" Doctor mentioned any thing to him of his private affairs.
" Interrogated, Whether, from what he knew of the Doctor's
" character, he thinks, that if he had married a person in a
" lower rank of life, he would have felt reluctant to communicate
" it to his friends or the deponent? Depones, that he thinks he
" would have mentioned it; and the deponent adds, That, as
" respects the deponent, the Doctor had an opportunity of doing
" so, for the deponent was once if not twice, but he is certain as
" to once, by mere accident, in the house where the person
" referred to lived. And being interrogated, the deponent
" explains, with regard to the foresaid occasion, that he happened
" to meet the Doctor in Princes' Street, who asked him if he
" would take a walk to the southward, which he agreed to, and

" when they had got the length of St Leonards, the Doctor " asked him if he would go into his house, which was somewhere " about St Leonards; that they went into it together; that the " deponent saw nobody in the house,—and that, after remaining " a little, they both came out together: That this happened " about a year before the Doctor's death, and that it was from " the same house that the Doctor was buried. Depones, that he " thinks the Doctor proposed going into the house merely that " the Doctor might get a rest, and that they remained about half " an hour. Interrogated, Whether he ever saw the Doctor and " the woman above referred to, together upon any occasion? " Depones, That he never did. Interrogated, depones, That " he knew that the Doctor, for some years previous to his " death, lived at the foresaid house, and not with his sisters. " Re-interrogated for the pursuer, depones, That when the " deponent joked the Doctor about his mistress, what passed " made the impression upon the deponent's mind, that the Doctor " did not mean to deny that the woman was his mistress, and " the deponent all along firmly believed that she was so, and " not his wife."

William Crighton, surgeon, deponed, " That he was acquainted " with the late Dr Archibald Hamilton, and he was particularly " intimate with him during his later years, and the Doctor had " been intimately acquainted with the deponent's father and " family. Interrogated, If the deponent was aware that Dr " Hamilton kept a woman as his mistress? Depones, That he " heard it rumoured that he did so, but the deponent never had " any conversation with the Doctor upon the subject, and he " did not think it likely that the Doctor would mention such a " thing to the deponent. Interrogated, depones, That he does " not recollect, and does not think that, during the Doctor's " lifetime, he ever heard that the Doctor had any children " by the person referred to, but the deponent may have heard it, " and the deponent's family used to lament that such a gentle-

" manlike person as the Doctor should keep a mistress. Inter-
" rogated, If he ever heard or understood that the Doctor had
" married any person, or declared a marriage? Depones,
" Never during the Doctor's life, and that it was the deponent's
" belief that the Doctor had died an unmarried man."

Mrs Taylor, the widow of a merchant, deponed, " That she
" was very intimately acquainted with the late Dr Hamilton and
" his family: and that the deponent's intimacy continued with
" the Doctor down to the Doctor's death. Interrogated, If,
" down to the Doctor's death, the deponent ever heard that he
" was married? Depones, That she never did; and the depo-
" nent believed him to have died an unmarried person. Interro-
" gated, Whether, if the Doctor had married, or declared a
" marriage with any one, she thinks that she and her family
" would have heard of it? Depones, That she does. Interro-
" gated, If the deponent was aware that the Doctor had a family
" of natural children? Depones, That she was. Interrogated,
" If she knew that the Doctor, some years before his death, re-
" sided with the mother of the children? Depones, That she
" knows that at one time he did not reside with her, and she is
" not aware that he ever did so, but she knows perfectly that he
" kept the said person as his mistress, and she understood that
" the connection continued down to the Doctor's death."

Dr Saunders deponed, " That he was intimately acquainted
" with the late Dr Archibald Hamilton, and that he attended him
" in his last illness. Interrogated, If he was aware that the Doctor
" kept a mistress? Depones, That he was so latterly. Interro-
" gated, If he understood this from the Doctor himself? Depones,
" That the Doctor never said so to the deponent, as far as he
" recollects; but when the deponent was attending him, he used
" to see a woman with him, whom the deponent judged to be
" his mistress. Interrogated, If the deponent ever had any
" reason to believe that the said woman was the Doctor's wife?
" Depones, That he never had. Interrogated, How the Doctor

" designated her when he spoke of her? Depones, That he has " heard the Doctor say, 'that woman,' or call her by her chris- " tian name, which was Mary or May, and that the impression " upon the deponent's mind, from the whole conduct of the " Doctor towards her, and of the way in which he spoke of her, " was, that she was his mistress. Interrogated, depones, That " the deponent is now speaking generally to his intercourse with " the Doctor, including particularly his attendance during his " last illness. Interrogated, depones, That he was in the habit " of seeing the said woman both in and out of the Doctor's room " when attending him, and that he never had at any time any " suspicion even that she was the Doctor's wife; and that the " deponent spoke to, and gave her directions just as he would " have done to a sick-nurse. Depones, That he knows that the " Doctor had a family, and he understood the woman above re- " ferred to, to be the mother of the children."

Walter Moir, Sheriff-substitute of Lanark, deponed, " That he " was most intimately acquainted with the late Dr Archibald " Hamilton. That the Doctor was the deponent's second cousin. " That after the Doctor's return from the army, he was in the " habit of consulting the deponent about his private and confi- " dential matters as a friend. Interrogated, Whether the depo- " nent was aware that the Doctor, after his return to Edinburgh, " kept a mistress? Depones, That he was aware of this, and " the Doctor told him so himself. Interrogated, depones, " That he knew that the Doctor had children by the said woman, " and he heard this also from the Doctor; and the deponent " adds of himself, That about two or three years before the " deponent left Edinburgh, he recollects of Miss Hamilton, a " sister of the Doctor's, calling at the deponent's and complain- " ing of something in the Doctor's conduct, which she said he " would explain himself, but which she declined doing, and re- " quested the deponent to mention to him her displeasure, and " to beg that he would amend his conduct: That accordingly,

" when the Doctor called, which he did almost every other day, " the deponent stated to him what had passed with his sister, " and the Doctor then said, ' Oh, it is about the girl that has the " children to me,' and he told the deponent that he and his " sister had had some high words about the subject: That the " deponent does not recollect of any thing farther that passed. " Interrogated, Whether the deponent ever heard, during the " Doctor's life, that he had married either the foresaid woman " or any other person? depones, That he never did; and he " always believed that the Doctor had died a bachelor. Inter- " rogated, Whether from his habits of intimacy with the Doctor, " he thinks that if he had married or declared a marriage, the " Doctor would have communicated it to him? depones, That " he thinks he would have given him some hint of it; indeed, he " is almost certain he would have mentioned it. Cross-interro- " gated for the defenders, depones, That he has no remembrance " of ever having visited the Doctor in any of his lodgings, and " the deponent was frequently quite ignorant of the Doctor's " address, although the Doctor was constantly calling at the " deponent's house. That he had no reason whatever for not " calling on the Doctor, and it was needless, as the Doctor was " constantly calling at the deponent's; and depones, That he " understood that the Doctor liked to live privately, and saw no " company at his lodgings."

Several other witnesses, persons who had lived in the neighbourhood of Dr Hamilton's lodgings in Brown Street, were examined for the pursuer, and deponed to a report in the neighbourhood, that the Doctor and May Clark were not married persons, but none of them had been in the habit of visiting or meeting the Doctor or May Clark.

Several witnesses were also examined for the defenders, (respondents,) as to habit and repute — among others, John Robertson, writer, deponed, " That he was acquainted with the " late Dr Hamilton, and their acquaintance commenced in 1818

" or 1819, at which time Dr Hamilton lived in Brown Street, " where the deponent also resided: That he occasionally visited " Dr Hamilton: That he understood the Doctor to be a married " man: That he knew his wife, and he also knows that that " person is the mother of the defenders in this action: That " the deponent was then a clerk to Mr Hamilton Miller, and " was then a married man, and the deponent's wife visited Mrs " Hamilton: That her present state of mind prevents her " giving evidence as a witness, but she was in perfect health at " the time referred to, and for years afterwards. That the de- " ponent and his wife were introduced to Dr and Mrs Hamilton " as married persons, and he always understood them to be so: " That the deponent and his wife came to occupy the room, " which had previously been possessed by Dr and Mrs Hamilton, " and it was in that way that they came to be introduced to each " other: That their acquaintance continued till Dr Hamilton's " death, and the deponent being seldom at home, Mrs Robertson " was better acquainted with them than the deponent. That " certainly neither he nor his wife would have had any com- " munication with Mrs Hamilton, had they not believed her to " be the Doctor's wife. That he and Mrs Robertson have drank " tea in Dr and Mrs Hamilton's house, and they have supped in " the deponent's, but not often. That they always conducted " themselves as man and wife, and were so treated by the de- " ponent, his wife and others, so far as the deponent ever saw. " That they lived privately. That during Dr Hamilton's life, " nothing ever occurred to create any doubt in the deponent's " mind that Doctor and Mrs Hamilton were married persons; " but after the Doctor's death, he heard, for the first time, that " the marriage was not a regular one, but by letter. That he " knows that Mrs Robertson's belief and understanding upon " the subject was the same as the deponent's. That when their " acquaintance commenced with Dr Hamilton, he had two " daughters, who, as far as the deponent knows, were reputed

" to be his lawful children: That afterwards, Mrs Hamilton " had twins, who were also acknowledged as the Doctor's lawful " children. Cross interrogated for the pursuer, depones, That " he thinks the Doctor must have been fully a year in Brown " Street, after the deponent went there, when he went to St " Leonards, where he died: That the deponent only called " twice at the Doctor's house at St Leonards, so far as he recol- " lects; but he on neither occasion saw the Doctor, nor did he ever " see him after he left Brown Street: That he, however, knows " that Mrs Robertson's acquaintance with the Doctor and Mrs " Hamilton continued, and that they were often together: " That the times when he was in company with the Doctor and " Mrs Hamilton did not exceed six, as he thinks, but they might " be more; and the deponent more frequently saw Mrs Hamil- " ton visiting Mrs Robertson than any other way: That the " deponent never dined with Dr and Mrs Hamilton. Interro- " gated, depones, That in speaking of Mrs Hamilton, the Doctor " always called her Mrs Hamilton, — in speaking to her, he " thinks he sometimes called her May."

Ann Russell deponed, " That the deponent's mother, till " within four years of her death, lived at the Crosscauseway, in " a house belonging to herself, and the deponent recollects seeing " the late Dr Archibald Hamilton at her mother's, inquiring about " her mother's house, which he afterwards rented from her, and " that upon that occasion he had some conversation with her " mother about purchasing some fixtures that were in the house. " That the deponent understood from him that he was a married " man with a family. That Dr Hamilton said he could not settle " about the bargain till he spoke to Mrs Hamilton, and that he " would bring her to see the house. That the Doctor called " again, and brought a lady with him, whom he called Mrs " Hamilton, and the house was then taken, and some fixtures and " other things purchased. That these things took place in the " end of 1820 or beginning of 1821, and the Doctor entered

" at Whitsunday 1821. That the deponent and her mother " remained a night in the house after the Doctor, Mrs Hamilton " and two children, had taken possession: That before that, " and on occasions of the deponent's being in Edinburgh, she " was twice at Dr Hamilton's drinking tea: That the deponent " was not invited, but having called, was asked by Mrs Ham- " ilton to remain to tea: That on one of the said occasions " Dr Hamilton was present, and drank tea along with them, " and that two daughters were there also: That, as far as " the deponent observed, the Doctor and Mrs Hamilton con- " ducted themselves to each other as man and wife: That he " addressed her as Mrs Hamilton, and treated both her and the " children with great kindness. Depones, That from all she saw " she never had any thought but that the Doctor and Mrs " Hamilton were married persons, and that the children were " their lawful children."

Agnes Slight, wife of James Slight, brass-founder, deponed, " That she at one time lived in Brown Street, and she recollects " that the late Dr Archibald Hamilton and Mrs Hamilton lived " on the same flat with the deponent and her husband, for more " than three years: That the deponent and her husband knew " Dr and Mrs Hamilton intimately, during most part of the fore- " said period. Interrogated, Whether she considered them " married persons or not? depones, That she always con- " sidered them married persons. That for some time there was " nobody in the stair but the deponent's family, and Dr and Mrs " Hamilton, — the tenement being newly built, — and they " were in each other's houses every day almost, although they " never took meals with each other. Interrogated, If that " house was Dr Hamilton's home? depones, That it appeared " to be so, for he was there every night. Depones, That, as far " as the deponent saw, they always conducted themselves as " married persons: That they had two daughters at that time, " and the deponent considered them to be lawful children. In-

" terrogated, Whether Dr Hamilton conducted himself towards " them as lawful children? depones, That he was very fond of " his children, and he behaved to them just as she would have " expected a father to do to his lawful children. That the de- " ponent had then two children. That she once saw two ladies " visiting at the Doctor's, who she understood to be his sisters, " and she was told so at the time by Mrs Hamilton. Inter- " rogated, Whether the deponent ever heard the children speak- " ing of their father's relations? depones, That she has. That " in speaking of them, they called Dr Hamilton's sisters their " aunts, and spoke as if they were acquainted with them. In- " terrogated, depones, That during the whole time the deponent " was acquainted with the Doctor and Mrs Hamilton, she saw " nothing that could lead her to suppose that they were not " married persons: That the conduct of Mrs Hamilton was also " strictly proper and correct, and she had no doubt of their being " married persons: That the Doctor and Mrs Hamilton never " visited together in the deponent's house: That at one period " the Doctor came in two or three times to assist the deponent's " brother-in-law in some chemical experiments, who was attend- " ing the chemistry class: That the Doctor also came in re- " peatedly to see the children when they were ill, and except on " these occasions, and the new year's morning before deponed " to, he never was in the deponent's house: That the depon- " ent's intimacy was rather with Mrs Hamilton than the Doctor. " That she has frequently seen Dr and Mrs Hamilton together " when the deponent was in their house, but she never heard " the Doctor address Mrs Hamilton by any name. Depones, " That when speaking of Mrs Hamilton to the deponent, the " Doctor always called her 'mother,' and never 'Mrs Hamilton.' " That in speaking to the Doctor of Mrs Hamilton, the deponent " always called her Mrs Hamilton, and never was checked by " the Doctor for doing so."

Ann Martin deponed, " That at one time she was in the

" service of Dr Hamilton, and she was then 15 years of age. " That she was engaged by Mrs Hamilton, and was with them " for six months: That when she went, they lived at the Cross- " causeway, and in three weeks they removed to St Leonards: " That this was the deponent's first service, and when she went, " the deponent and her father and mother believed that she was " hired with married persons: That the deponent was there for " six months, and the Doctor slept in the house every night, and " made it his home. That, from first to last, she always con- " sidered Doctor and Mrs Hamilton to be married persons, and " she never saw any thing that could lead her to think otherwise: " That after she left them, she went to serve with Mr and Mrs " Grinton, clothier, Nicolson Street; and, That the latter treated " each other and lived together just in the same way as Dr and " Mrs Hamilton did. That Mrs Hamilton was always called by " that name. That in speaking of her to the deponent, the " Doctor called her either Mrs Hamilton or 'your mistress.' " That she does not think the Doctor dined twice from home all " the time the deponent was with them: That Mrs Hamilton " always sat at the head of the table, and that they lived on " affectionate terms with each other, and the deponent never saw " any thing light or improper in either of them: That she has " seen them go out together, but very seldom: That at the " shops where they dealt, Mrs Hamilton was always spoken of " as Mrs Hamilton: That they had four children, and the de- " ponent considered them to be lawful children."

Isabella Paterson deponed, " That she was in his house as an " assistant to the servant, and to take care of the children, and " she believes she was there all the time they lived at St " Leonards, which might be about a year: That the deponent's " father and mother lived in the neighbourhood: That the " deponent always understood Doctor and Mrs Hamilton to be " married persons, and she was uniformly called Mrs Hamilton: " That the Doctor gave her that name: That he lived in the

" house, taking his meals, and sleeping there: That the Doctor " and Mrs Hamilton and the children all dined together, she sit- " ting at the head of the table: That she has since been a servant " in the houses of married people, and they conducted themselves " towards each other just in the same way as Doctor and Mrs " Hamilton: That she has seen Doctor Hamilton's two sisters at " the house: That this was during his last illness, and within " five or six weeks of his death, and she never saw them before " that; but the deponent, till the Doctor's last illness, did not " sleep in the house, and was only there occasionally: That " the Doctor's sisters saw Mrs Hamilton when they were there: " That they asked for Mrs Hamilton, giving her that name: " That she has seen them speaking to the children: That she " has gone out and in of the room when they were with Mrs " Hamilton: That they were then conversing together, and " appeared to be on friendly terms: That when Doctor Ham- " ilton got worse, his bed room was changed: That Mrs " Hamilton was the only one of his connections who attended " him. That, down to the last, he spoke of her as Mrs Hamilton, " and appeared to treat her as his wife: That when the de- " ponent opened the door to the Doctor's sisters, she has heard " them ask, Whether there was any other person in the room " with the Doctor, but Mrs Hamilton? Depones, That never " having been in company with Mrs Hamilton and the Doctor's " sisters, she never heard them address her by the name of Mrs " Hamilton."

Jacob Lisenheim deponed, " That the deponent has been in " the Doctor's house in the Crosscauseway several times: That " the Doctor introduced him to Mrs Hamilton: That the depo- " nent had some French gloves to sell: That Major Lindsay " bought some more than once, and the Doctor being at the " Major's, the Doctor said to the deponent, ' If my wife wants " ' gloves, I will buy some from you;' and the Doctor appointed " an hour to meet him at the Doctor's house: That the deponent

" went there accordingly: That the Doctor called Mrs Hamilton " in, and said, ' If you want some of these gloves you may have " them;' and she then bought a pair of lady's gloves, and he " now exhibits an entry in his books, in an account titled, Dr " ' Hamilton,' which entry is as follows:—' 1821, February 22. " ' One pair lady's gloves, 2s.' "

Alexander Deuchar deponed, " That he married the widow " of Thomas M'Whirter, in March 1823, and his wife died in " 1827: That for a considerable time before the deponent's mar- " riage, Mrs Deuchar had been acquainted with Dr Archibald " Hamilton, and in that way the deponent also became acquainted " with the Doctor before the deponent's marriage: That his " acquaintance commenced in 1822: That the deponent con- " sidered him a married man: That the deponent and Mrs " Deuchar were also acquainted with Mrs Hamilton, and visited " her before the deponent's marriage, which the deponent cer- " tainly would not have done had he not believed that she and " the Doctor were married persons: That Mrs Deuchar knew " Mrs Hamilton intimately before her marriage with the depo- " nent, and frequently visited her: That the deponent knows " perfectly that Mrs Deuchar considered the Doctor and Mrs " Hamilton to be married; and he is satisfied that, had she not " so, she would not have visited them, or introduced the depo- " nent to them: That his acquaintance with Dr and Mrs " Hamilton was prior to the deponent's marriage in 1823: That " the deponent never visited Mrs Hamilton after the Doctor's " death; but Mrs Deuchar and Mrs Hamilton visited each " other: That the deponent used to meet Mrs Deuchar before " their marriage, in the evening, at Mrs Hamilton's, and the " deponent has also met Dr and Mrs Hamilton at Mrs " M'Whirter's about the same time, at tea and visiting: That " when he saw Dr and Mrs Hamilton together, they appeared " to conduct themselves towards each other as married persons, " and the deponent never had a doubt upon the subject: That

" they seemed to live together openly as man and wife, just as " the deponent would expect married people to do. Depones, " That the Doctor has spoken to the deponent of Mrs Hamilton " as Mrs Hamilton, conversing in regard to her as his wife, and " calling her Mrs Hamilton."

Helen Meldrum deponed, " That she was at one time in the " service of the late Dr Archibald Hamilton: That the deponent " entered Dr Hamilton's service at the November term previous " to his death, and she remained for six months: That as far as " she understood, Dr and Mrs Hamilton were married persons: " That the Doctor treated Mrs Hamilton respectfully and affec- " tionately as his wife, and they lived as happily together as any " lady and gentleman she ever served with: That they had four " children, and the deponent considered them to be lawful " children: That the Doctor always, in speaking of Mrs Hamil- " ton, called her Mrs Hamilton. Depones, That Dr Hamilton " was only confined for four weeks previous to his death: That " two or three weeks before it, the Miss Hamiltons, his sisters, " were sent for: That they came to see the Doctor, and they " took lodgings in the neighbourhood, there being no accommo- " dation for them in the Doctor's house. Depones, That she has " seen Mrs Hamilton and the Miss Hamiltons together during " the Doctor's illness, and she never saw any thing between " them but what was agreeable, nor any thing that could lead " her to suppose that they did not consider her to be the wife of " Dr Hamilton. Depones, That when the Miss Hamiltons saw " the children, they appeared to treat them kindly: That she " never saw any thing in the conduct of Dr or Mrs Hamilton " to make her doubt that they were married persons: That she " has always believed them to be so: That she never saw the " Miss Hamiltons at Dr Hamilton's till they were sent for, as " before deponed to, and she does not think they could have " been there, while she was a servant, without her seeing them: " That during the time the Miss Hamiltons were residing in the

" neighbourhood, they were repeatedly going back and forward " in the course of the day. Depones, That she never was in the " room, or present with the Miss Hamiltons and Mrs Hamilton, " long enough to hear any conversation that passed between " them. Interrogated, Whether she ever heard the Miss " Hamiltons call Mrs Hamilton by that name? Depones, That " she never did, and she understood there was some difference " or quarrel between them before the deponent entered the " service."

Robert Slater deponed, " That the deponent was for some " years an apprentice with Mr M'Whirter, writer in Edinburgh: " That, during that period, he was daily in Mr M'Whirter's " house: That Mr M'Whirter was a married man: That he " has very frequently met the late Dr Archibald Hamilton at " Mr M'Whirter's: That he considered Dr Hamilton a married " man: That he has frequently seen his wife and family at Mr " M'Whirter's: That they were there visiting, and were inti- " mate with Mr and Mrs M'Whirter: That he has seen them " occasionally at Mr M'Whirter's at meals, as well as visiting: " That Dr and Mrs Hamilton always apparently conducted " themselves as married persons: That the lady always passed " under the name of Mrs Hamilton: That she was always " treated by Mr and Mrs M'Whirter as a married woman, and " the deponent never doubted that she was so: That both Mr " and Mrs M'Whirter are dead: That they had very few " acquaintances, and received few visiters: That the persons " who did come about them were all reputable; and the depon- " ent does not think they would have received Mrs Hamilton, if " they had believed her not to be the wife of Dr Hamilton; but " at the same time he cannot speak to what might be their " sentiments: He only gives his opinion from what he saw of " their conduct generally: That Mr M'Whirter was agent for " Dr Hamilton. Depones, That the deponent never had any " communication with Dr Hamilton about his private matters.

" Depones, That when the Doctor spoke to Mrs Hamilton, he " called her by her christian name, and when he spoke of her he " called her Mrs Hamilton: That the deponent never heard " him call her his wife, or any other person do so in his " presence."

The documentary evidence produced for the pursuer, (appellant,) consisted, 1st, Of a will executed by Dr Hamilton on the 4th of October, 1820, bearing, " for the love, favour, and affec- " tion I have and bear to Mary Hamilton and Janet Hamilton, " my daughters, and May Clark, their mother, I do therefore " hereby make, constitute, and appoint the said Mary and Janet " Hamiltons, or any other children that may be procreated be- " twixt the said May Clark, their said mother, and me, to " be my sole executors, but also my universal legatorys." Throughout this will the mother of the respondents was called " May Clark," and they themselves were either called by their names, or spoken of as " her family," or " my children;" and the Doctor's whole estate, with the exception of his interest in the pawnbroking business, was given " to and in favour of the " said May Clark, Mary and Janet Hamiltons, and such child " or children as may be procreated betwixt the said May Clark " and me, their heirs, executors or assignees." As to the pawnbroking business, so soon as it yielded L.200 per annum, May Clark and her children were to draw two-thirds of the profits, and the appellant one-third for his life, and, at his death, his third was to be drawn by the testator's sisters.

2d, Of a codicil to the will, executed on the 19th of February, 1823, in which the respondents and their mother were spoken of in these terms,—" May Clark, and my four children by her."

3d, A variety of letters, dated between 1819 and 1822, written by Dr Hamilton, from London, to the mother of the respondents, addressed in the inside, " My dear Mary," or " My dearest Mary," and concluding, " Yours affectionately." The address on the outside of these letters, when produced in Court, was, to

"Mrs Hamilton," but, according to the opinion of several engravers, the letter "s" in "Mrs" was an *ex post facto* operation, not in the handwriting of Dr Hamilton. In one of these letters, written from the house of the appellant, the Doctor complained of not being comfortable, and added, "don't say this to my sister." In another he enclosed L.6, and said, "to save the expense of "a double letter, you will, on receipt of this, give, or send down "to my sisters, L.3." In another he said, "Gilbert will give "you any little money you may want till I come home, and if I "don't get down before the 25th, tell him to give some to my "sisters." And in all of them he inquired after the respondents in the most affectionate manner.

On the other hand, the documentary evidence produced for the defenders, (respondents,) was, — 1st, The letter of 26th September, 1817, founded on in the defences.

2d, An entry in the blank leaf of a Bible which had belonged to Dr Hamilton, in these terms, —

"*Edinburgh*, 10*th May*, 1815.

"Mary Hamilton, born the 25th December, 1811.

"Jennet Hamilton, born the 21st November, 1813.

"James and Archibald, born 29th August, 1822.

"Registered in the parish of Canongate. An Extract "obtained 22d April, 1824.

"W. L. and J. G., *witnesses*."

3d, Various receipts for rent of the houses in Brown Street, Crosscauseway, and St Leonards, all of which, with one exception, were in the name of "Mr" Hamilton, the exception being in the name of "Mrs" Hamilton.

4th, An account made out by a tradesman in the name of "Mr Hamilton," and a promissory note for the amount, signed "Mrs H. for Mr Hamilton."

5th, Various accounts for clothes to the respondents and their mother, made out in the name of "Mrs" Hamilton.

6th, Various notes of assessed taxes, and a warrant to poind the goods of "Archibald Hamilton" for non-payment of the amount.

7th, A note from Dr Hamilton, to Gilbert, his partner, in these terms: — "GILBERT — Will you give Mrs H. L.4, and will "you take the trouble to call upon Polmore to-night, and give "your bill for the balance at three months? This is the only "way he will settle it. Yours, (Signed) AR. HAMILTON."

II. Marriage by the letter of 26th September, 1817.

To negative this branch of the defence, John Dickie, a writer to the signet, who had been the friend and the legal adviser of Dr Hamilton, was examined by the pursuer, (appellant,) and deponed *in initialibus*, "That he never had any correspondence "with the pursuer as to the present action; but that, immediately "after Dr Hamilton's death, the deponent communicated to the "pursuer, by letter, the circumstance of the Doctor's connec- "tion with the mother of the defenders, and that before this, that "person had alleged herself to be the Doctor's widow; and that, "on the pursuer's answering the deponent's letter, stating that "he meant to question the legitimacy of the defenders, the "deponent intimated to him, that in that case, he could not act "as his agent, or give him any advice upon the subject. "That he did not keep any copies of his letters to the pursuer "on this occasion, and indeed was not in the custom of keeping "any of his letters to the pursuer, as they were all almost of a "friendly and confidential nature, and the deponent does not "believe that he preserved the foresaid letter of the pursuer to "him."

Subsequently, Mr Dickie produced several letters from the pursuer to him, and thereafter he further deponed *in initialibus*, "That when the deponent first wrote the pursuer after the "Doctor's death, he informed him that he knew that the Doctor

" had left a letter acknowledging the defenders' mother as his " wife, and the deponent thinks that it was in consequence of the " information so given, that the pursuer wrote to the deponent " one of the letters transmitted to the Commissioner; and depones " farther, That the deponent then thought it his duty to write " the pursuer, and did write him, of all the particulars as to the " foresaid letter, within the deponent's personal knowledge: " That the pursuer was then in France."

Dickie was then examined in chief, and deponed, " That he " acted as Dr Hamilton's agent in one or two matters, and that " the first occasion on which this occurred, related to an applica- " tion which was served by the kirk-treasurer of the Canongate " against the defenders' mother, to have her ordained to appear " and be examined as to two natural children. That these two " children are the two eldest of the defenders. Interrogated, " Whether, after this, the deponent had any conversation with " Dr Hamilton in regard to the defenders' mother? Depones, " never, except on one occasion: That, in the year 1817 or 1818, " the Doctor waited upon the deponent, and stated, that he " wished to execute some writing by which the said person might " be enabled to receive the pension of an army surgeon's widow: " That the deponent stated to the Doctor, that, in his opinion, " that could only be done by making her his wife; to which the " Doctor replied, that that he never would do; but he stated at " the same time, that he wished the deponent would give him the " form of an acknowledgment of the defenders' mother as his " wife, and that he would leave it in the deponent's hands, and " repeating that he would not make her his wife, and that, there- " fore, he would not deliver the document into her possession: " That the deponent then wrote out two lines of a simple ac- " knowledgment of the defenders' mother as his wife, which the " Doctor took away with him. Depones, That in a short time, " which might be within a week or a fortnight, the Doctor re- " turned, bringing with him the acknowledgment written in his

" own hand, and subscribed by him, and addressed to the de-
" fenders' mother, and he delivered it to the deponent, requesting
" him to be the custodier of it, and expressed an anxious desire
" that it should be so arranged, that, in the event of the depo-
" nent's death, it should fall into no hands but the Doctor's own;
" and that the deponent then, in presence of the Doctor, put the
" acknowledgment in an envelope, upon the back of which the
" deponent wrote, — 'To be delivered into the hands of Archi-
" 'bald Hamilton, Esq., unopened,' and it was then sealed with
" the Doctor's seal, as the deponent thinks. Depones, That the
" deponent does not recollect that any thing farther passed on
" that occasion. Interrogated, Whether, on the above occasion,
" the Doctor again said any thing to the effect of his being re-
" solved not to make the defenders' mother his wife during his
" life? Depones, That he cannot charge his memory as to that,
" but he recollects that, either on that occasion or the previous
" one, but he thinks upon that occasion, he mentioned to the
" Doctor his opinion, that a latent document of the above descrip-
" tion would not avail him with reference to the object in view,
" of obtaining the pension of a widow, on which the Doctor re-
" marked, that it might be so, but it could do no harm, and might
" be of use. Interrogated, Whether the deponent retained the
" said document in his posession during Dr Hamilton's life?
" Depones, That he did. Interrogated, Whether the deponent
" considered himself as the custodier of the said document for
" Dr Hamilton alone, and bound to deliver it up to him, upon
" his request to that effect? Depones, That he considered him-
" self the holder of the document on the Doctor's account only,
" and he would have delivered it to him if required. That he
" recollects the Doctor's last illness. That when on his death-
" bed, the Doctor sent for the deponent, and put into his hand
" a deed of settlement, which he had executed some time before,
" and gave the deponent instructions to make some alterations
" upon it: That the deponent took a note of these at the moment,

" and prepared a codicil in terms of the instructions so received,
" which he took to the Doctor's next day, when it was executed,
" and the deponent produces the settlement and codicil, which is
" marked by him and the Commissioner as relative hereto.
" Interrogated, Whether, on these occasions, the Doctor made
" any allusions to the foresaid acknowledgment in the deponents'
" custody? Depones, That on the first occasion when the
" deponent called, he saw the defenders' mother, who was with
" the Doctor in the bed-room: That she left the room, and the
" Doctor then said she was the person the deponent knew about,
" and reminded the deponent of the letter of acknowledgment,
" and requested the deponent to give it to her in the event of his
" death, and that the Doctor afterwards, upon the defenders'
" mother returning to the room on that day, or on the occasion
" when the deponent got the codicil executed on the following
" day, repeated, in her presence, his request that the deponent
" should deliver the acknowledgment to her in the event of his
" death. Interrogated, Whether he recollects the words the
" Doctor used when he did so? Depones, That the precise
" words the deponent cannot recollect; but it was to this effect,
" that, addressing the deponent, he said, 'You know you have a
" 'letter addressed to May,' meaning the defenders' mother,
" 'and you will give it to her after all is over with me.' That
" nothing passed in the presence of the defenders' mother, in-
" timating the nature or contents of the said letter. That the
" Doctor was quite aware that he was dying. Interrogated,
" Whether, on any occasion, any thing ever passed between the
" Doctor and the deponent, importing that the Doctor had made
" the defenders' mother his wife? Depones, No, never. Inter-
" rogated, Whether, when the deponent wrote the codicil, he
" was under the impression that the defenders' mother was still
" the Doctor's mistress? Depones, That he was. And depones,
" That he never would have written the codicil in the terms he
" did, so far as regards the name of the defenders' mother, had

" he supposed her to be the Doctor's wife. Depones, That " before the codicil was executed, the deponent read it over to " the Doctor, who was then in full possession of his faculties. " That after the codicil was executed, and the deponent had left " the house, he was called back by the defenders' mother, who " said it was by desire of the Doctor, and that, when the depo- " nent, on his return, entered the Doctor's room, she followed him, " and the Doctor then said, that he wished to give the defen- " ders' mother, in the deponent's presence, his gold watch and " seals, as a mark of his sense of her great kindness and attention " to him during his illness, which he then did. That he thinks " the Doctor did not live 48 hours after the execution of the " codicil. Interrogated, depones, That after the funeral the " deponent returned to the house along with the late Mr John " Harvy and Mr Gilbert, the present husband of the defenders' " mother, and in their presence, and that of the Misses Hamilton, " the Doctor's sisters, and the defenders' mother, the deponent " read over the settlement and codicil, and then broke open the " envelope of the foresaid acknowledgment, and delivered the " acknowledgment itself to the defenders' mother. Interrogated, " whether the acknowledgment was read out? Depones, That " probably it might, but he does not recollect that it was, and he " has no recollection of any thing being said by any one in re- " gard to it. That no one was present when the letter was de- " posited with the deponent, and the deponent was not aware " that any other person was cognizant of the letter except the " deponent and the Doctor, and, as the deponent supposed, the " defenders' mother herself; and the deponent's reason for this " supposition was, that when he was stating to the Doctor his " opinion that the acknowledgment would not avail, the Doctor " remarked, that it would please or satisfy her. That from the " date when the letter was deposited with the deponent, down to " the Doctor's last illness, the deponent had no conversation with " the Doctor regarding the letter or the defenders' mother.

" That the deponent considered the depositation of the letter, " and all that passed upon it, as confidential, and never mentioned " it to any one. That when, on the Doctor's last illness, he, in " the defenders' mother's presence, requested the deponent, " when all was over with him, to deliver the acknowledgment " to the defenders' mother, the Doctor said this aloud, with the " apparent intention that it should be heard by the defenders' " mother, and as the deponent understood, in order that there " might be an acknowledgment by the deponent, in her presence, " that he was possessed of the letter. That he cannot say that " the letter of acknowledgment in process is an exact transcript " of the form given by the deponent to the Doctor; but that in " so far as it mentions there being reasons for keeping the mar- " riage private, he thinks, that if that made part of the form " given by him to the Doctor, it must have been by the Doctor's " suggestions to that effect; and that the deponent's own atten- " tion would be principally directed to giving words which would " amount to a direct acknowledgment of marriage. That the " deponent's impression certainly was, that the defenders' mother " knew that a letter declaring her to be the Doctor's wife, had " been placed in the deponent's custody. That from the diffi- " culties which the deponent saw from Mr Campbell's letter were " in the way, and the circumstances which were in the deponent's " knowledge, he did not think it would be proper for him to take " any steps in the matter, and he did not do so. Depones, That " the deponent had, previous to the receipt of Mr Campbell's " letter, written the letter No. 46 of process, addressed to the " defenders' mother, suggesting that she should apply to the late " Mr John Tait, junior, W.S., upon the subject, who had been " a friend of the Doctor's, and whom the deponent had previously " spoken to in regard to the matter. Depones, That on the " receipt of Mr Campbell's letter, the deponent had a consulta- " tion with Mr Tait, and that both Mr Tait and he were of " opinion, that, in the circumstances, so far as knowu to them, it

" would not be proper that either of them should take any farther " charge in reference to procuring the pension; and the depo- " nent thinks that he mentioned this to Mr Gilbert, telling him " at the same time that he did not believe that the pension would " be got unless a decree of constitution of marriage was obtained. " Interrogated, depones, That the deponent's foresaid resolution " was, he has no doubt, in some part influenced by his impres- " sion of the collision that was likely to take place between the " pursuer and the defenders' mother and her family, and his " resolution was formed before he received any letters from the " pursuer, and these letters, when received, must, of course, have " tended to confirm it. And being referred to a passage in the " deponent's letter to the defenders' mother, mentioning that Mr " Tait would give her the Petition to the War-Office with the " necessary certificate, and asked to explain what precise docu- " ments are there alluded to? Depones, That he has no very " exact recollection on the subject, but he thinks he got the " papers referred to from Mr Gilbert, and that when speaking " to Mr Tait about the pension, he had left them with him, and " that all he meant was, that Mr Tait would give them up when " wanted. Interrogated, Whether Mr Thomas Hamilton was " present at the funeral or at the meeting after it, when the will " was read? Depones, That he does not recollect whether he " was present at the funeral, or at the meeting: That his atten- " tion being called to a letter addressed by him to the defenders' " mother, which bears that 'he presents compliments to Mrs " 'Hamilton;' and interrogated, Whether he gave her that " designation in the belief that she had a right to it? Depones, " That he did not, but only designed her as Mrs Hamilton, " because she herself assumed the name."

John Waudby, who had formerly been a bookseller, and lived in the same flat of the house in Brown Street with Dr Hamilton, but who at the time of his examination kept a shop for the sale of pies and spirits, was examined for the defenders, (*respondents*,)

and deponed, "That there was not only an intimacy between the "Doctor and the deponent, but also between Mrs Hamilton and "the deponent's wife. Interrogated, If any thing ever passed "between the Doctor and the deponent on the subject of the "Doctor's marriage? Depones, That the Doctor told him that his "marriage was a private one, but that, to satisfy any inquiries "that might afterwards be made, he had written a letter, which, "in his opinion, would prevent the marriage being called in "question at any future period: That the Doctor shewed the "letter to the deponent, and the deponent having read it, the "Doctor asked him if the deponent considered it sufficient to "secure an interest in his effects for his family, and that the de-"ponent answered, that he considered it sufficiently secure, and "perfectly satisfactory. Interrogated, depones, That, to the "best of the deponent's recollection, this took place during the "second year of the Doctor and the deponent's residence in the "foresaid house, No. 3, Brown Street; and the deponent is cer-"tain that it took place in a room occupied by him in that house, "the Doctor having come to him apparently for the purpose of "speaking to him upon the subject; and the deponent adds, "that, at this distance of time, he cannot be certain that this did "not take place after the Doctor left No. 3, Brown Street. De-"pones, That, till the above conversation, the deponent never "knew that the Doctor's marriage was not a regular one, and "after it he still considered him a married man, although he "then understood the marriage to be a private one, of which the "letter had been written as an acknowledgment. Interrogated, "Whether any thing passed between the deponent and Dr "Hamilton, on the subject of the Doctor's having concealed his "marriage from any, or some of his friends? Depones, That, "at the time he shewed the deponent the letter, or about it, he "told the deponent that his circumstances were such, that he "could not support Mrs Hamilton according to his rank in life, "and therefore he had kept his marriage private, but he did not

" enjoin the deponent to observe any secrecy about it. Inter-
" rogated, depones, That he is perfectly aware that Mrs Hamil-
" ton knew of the existence of the foresaid letter of acknowledg-
" ment. Interrogated, How the deponent knew this? De-
" pones, That Mrs Hamilton told him so herself, and that this
" was shortly after the Doctor had spoken to him about it. And
" being shewn a letter, and asked, Whether that is the letter of
" acknowledgment referred to? Depones, That he is perfectly
" certain that is the letter, and he observes that it is dated in
" September, 1817, and he now thinks he must have seen it
" about that time, as his impression is, that he saw it shortly
" after it was written. That he recollects entering the employ-
" ment of Messrs Oliver and Boyd, booksellers and publishers,
" as a traveller, for the purpose of getting their class-books in-
" troduced into public schools. Depones, That he thinks this
" took place in June or July 1818, and from having seen the
" date of the letter of acknowledgment, he thinks that it was the
" autumn before this that the letter was shewn to him: That
" on shewing the deponent the foresaid letter, the Doctor did
" not say any thing about a pension to Mrs Hamilton, or men-
" tion any particular description of property, which he meant to
" secure to her or his family, but mentioned his property gene-
" rally. Interrogated, How Mrs Hamilton came to speak to the
" deponent about the foresaid letter, and where it took place?
" Depones, That he does not recollect the particular occasion on
" which it occurred, but he remembers quite well that Mrs
" Hamilton told us that Mr Hamilton had executed a letter to
" secure her an interest in his effects. Interrogated, What he
" means by telling us? Depones, That he means the deponent
" and his wife. Interrogated, Where this took place? De-
" pones, That it was in the deponent's room. Interrogated, If
" any other person was present? Depones, Not that he recol-
" lects of. Interrogated, who commenced the conversation?
" Depones, That Mrs Hamilton gave the information herself.

" Interrogated, depones, That the deponent told Mrs Hamilton " that he had seen the letter. Interrogated, Whether she ap- " peared to know that the deponent was aware of the letter? " Depones, That he dares say she knew quite well. Interroga- " ted, depones, That it was not in Dr Hamilton's presence that " this took place, and he cannot recollect at what time of the " day this happened, and whether it was a month, or more than " a month, after Dr Hamilton's communication to him. That " he is aware that Mrs Hamilton is now Mrs Gilbert, and the " deponent's intimacy with her has continued down to the pre- " sent day. Interrogated, depones, That he does not think that " Dr Hamilon ever spoke of the said letter in the deponent's " presence, except at the time before deponed to, at least he does " not recollect that he ever did so. Interrogated by the Com- " missioner, Whether he recollects of the foresaid letter ever " having been spoken of either by Dr or Mrs Hamilton, except " on the two occasions before deponed to? Depones, That he " does. That after Dr Hamilton's death, Mrs Hamilton told the " deponent that some doubts had been raised as to her being en- " titled to the pension as the Doctor's widow, and the deponent " advised her to send that letter, and any other evidence she might " have, to the proper quarter. Interrogated, Whether he ever " heard the said letter spoken of before the Doctor's death, except " upon the two occasions above referred to? Depones, That he " does not. Interrogated, If he recollects of the Doctor mention- " ing or alluding to the said letter in Mrs Hamilton's presence? " Depones, That the Doctor did so, when Mrs Hamilton men- " tioned the letter to the deponent. And the deponent's atten- " tion being called to a previous part of his deposition, in which " he has stated, that, when Mrs Hamilton mentioned the letter " to the deponent, it was not in Dr Hamilton's presence. " Depones, That Dr Hamilton was not present when she first " spoke of it, but he was present afterwards when there was a " conversation about the letter, which took place either the same

" day, or about that period, or it might be a continuation of the " same conversation. Interrogated, What then passed? De- " pones, That the letter was spoken of, and the Doctor con- " sidered it in itself sufficient to satisfy all farther inquiries: " That he thinks the deponent's wife was present, but he cannot " positively say. Interrogated, depones, That he is certain the " deponent's wife was present when Mrs Hamilton first spoke " of the letter. Interrogated, Whether, when the Doctor spoke " of the letter the second time, he shewed it again? Depones, " That he thinks he did. Interrogated, depones, That he never " saw any scroll or copy of the letter. Interrogated, depones, " That the letter was in the possession of the Doctor. Interro- " gated, depones, That he is quite certain that Dr Hamilton was " not in the room when Mrs Hamilton spoke of the letter. " Interrogated, depones, That Mrs Hamilton came to the de- " ponent and his wife to mention the letter to them as a piece of " intelligence, or to make them acquainted with it. Interroga- " ted, depones, That he does not know whether Mrs Hamilton " was aware of the deponent's knowing about the letter or not. " Interrogated, If he cannot recollect how Dr Hamilton came to " be a party in the conversation between the deponent and Mrs " Hamilton, as to the said letter? Depones, That he came in " order to satisfy Mrs Hamilton that he had done all that was " requisite to secure his means to Mrs Hamilton, as his wife. " Depones, That, if his memory serves him right, Dr Hamilton " came in before Mrs Hamilton had left the deponent's room, " when she first mentioned the letter. Depones, That, upon " coming in, Dr Hamilton shewed the letter which he had about " him, and said he had executed it for behoof of Mrs Hamilton " and his family. Interrogated, If the letter was read again, or " shewn to the deponent's wife? Depones, That the Doctor read " it out himself, and the deponent's wife heard it read, and he " thinks the Doctor gave it to the deponent to read over; and " depones, That he thinks it likely the deponent repeated the

" observation which he had made before, that the letter was " quite satisfactory: That the deponent never saw the letter " again, and he has no recollection of its having been afterwards " spoken of. Re-interrogated for the defenders, depones, That " in referring to the letter in the conversation which, after Dr " Hamilton's death, he had with Mrs Hamilton, as above de- " poned to, he did so from his knowledge, acquired in manner " before stated, of the existence of such a letter, and in the be- " lief that it was in Mrs Hamilton's possession."

Elizabeth Waudby, the wife of the preceding witness, another witness for the respondents, deponed, " That she never heard " any thing about whether Dr and Mrs Hamilton were married " by the forms of the church, but she knows that her husband " was consulted about a letter which Dr Hamilton wrote: but " she never saw it till after Dr Hamilton's death. Interrogated, " When she first heard that her husband had been consulted " about the foresaid letter? Depones, That she cannot recollect " the exact period. Interrogated, depones, That it was before " Dr Hamilton's death, and before the deponent and her husband " left Brown Street. Interrogated, Who told her about the " letter? Depones, That it was her husband. Interrogated, " depones, That he did not tell her at the time when he was " consulted about the letter, as she understood. Interrogated, " Whether Mrs Hamilton ever spoke to the deponent about the " said letter? Depones, That she did so: That she mentioned " that the Doctor had written a letter, acknowledging her as " his wife in every respect: That she knows this took place " previous to the Doctor's death, and a long while before it, and " she thinks it was when they were all living in Brown Street, " and after the Doctor had left No. 3, but she cannot speak more " particularly as to the time. Interrogated, Whether her hus- " band had mentioned the aforesaid letter of acknowledgment " before Doctor and Mrs Hamilton left No. 3, Brown Street? " Depones, That he did not do so till after they had left No. 3;

" and depones, That it was some time after that, but how long " she does not know, that Mrs Hamilton spoke to the depo- " nent about the letter. Interrogated, Where it was she did so? " Depones, That, to the best of her recollection, it was one " Saturday afternoon, when the deponent and Mrs Hamilton " were going to the market: That Mrs Hamilton, on the way " there, said, that the Doctor had made all things right; and she " said no more particularly. Interrogated, Whether Mrs Hamil- " ton explained to the deponent, or the deponent asked Mrs Ham- " ilton what she meant by the Doctor's having made all things " right for her? Depones, That the deponent never said a " single word, except that she was happy that all things were " right. Interrogated, What the deponent understood by all " things being made right? Depones, That she understood " that the Doctor had made his will, leaving every thing to the " children. Interrogated, Whether, upon this occasion, Mrs " Hamilton said any thing about the foresaid letter? Depones, " That she did not. Interrogated, Whether, upon any other " occasion, Mrs Hamilton ever mentioned the foresaid letter? " Depones, That she never did so till after Dr Hamilton's " death. And the deponent's attention being now called " to a prior part of her deposition, in which she depones, that " Mrs Hamilton mentioned to her that the Doctor had written a " letter acknowledging her as his wife, in every respect, and " that she knows this took place previous to the Doctor's death, " and a long while before it: and to another part of it, where " she refers to the occasion of going to the market, as one on which " Mrs Hamilton had spoken to her of the letter? Depones, " That she must have been mistaken if she made the above " statements, for she did not intend to do so; and she is quite " positive that Mrs Hamilton never mentioned the letter to her, " and that, till after Dr Hamilton's death, the deponent never " heard of it, except from the deponent's own husband. That " she never had any conversation about it with the Doctor. In-

" terrogated by the Commissioner, Whether she recollects of " Dr Hamilton ever coming into the deponent's room in No. 3, " Brown Street, and mentioning the foresaid letter of acknow- " ledgment. Depones, That she is certain he never did. In- " terrogated Whether she ever heard the foresaid letter read " in the presence of Dr Hamilton, Mrs Hamilton, and the " deponent's husband, or any of them? Depones, That she " never did; but the deponent's husband repeated the words of " the letter to the deponent when no other person was present, " and this took place before the Doctor's death. Interrogated " depones, That she saw the letter shortly after Dr Hamilton's " death, and that it was shewn to her by Mrs Hamilton, in " the deponent's house."

The documentary evidence tendered by the appellant in support of this branch of his case consisted,

I. Of excerpts from four letters from the appellant to Mr Dickie, produced by that gentleman at his examination, namely, 1. Excerpt from a letter, dated Paris, 3d April, 1823. " My " affection and regard for my poor brother is known. My " regret for his loss is deep and sincere. I am not, then, the " one who would willingly permit a reflection to escape; but " I cannot suppress my feelings of deep regret, not unmixed " with other sensations, at the sad and lasting wreck he has " made of his name, by giving to a connection so utterly dis- " graceful and so unworthy of him, all the rights and privileges " which would have belonged to an open and honourable con- " nection. With all my affection for my brother, I shall ever " consider this act of his as a stain upon his name. I not only " say this, but I say also, that it is an act of injustice which I could " not have believed he would have done. I complain, too, that " I have been grossly deceived; for, while he had given this " letter five years ago, it appears he not only concealed it stud- " iously from me, but, from his own opinion of the connection, " and from other circumstances which I need not detail, he evi-

" dently shewed that he considered it only as one of those unfor-
" tunate connections which too often occur, and which he wished,
" if possible, to get quit of. After these unequivocal expres-
" sions of his sentiments, added to other things, you may well
" conceive with what feelings I learn, (and learn for the first
" time,) that he has given to that woman, (and that, too, for five
" years,) the rights and privileges of a wife. The connection
" before this acknowledgment was sufficiently degrading, and I
" can assure you that it helped to withdraw my brother from
" that society which he had a right to, and had been accustomed
" to, and it wanted only this act to complete the degradation.
" * * * I do most strongly complain of the sys-
" tem of deception which has been practised upon me. Had my
" brother told me his determination with regard to that connec-
" tion, he knew perfectly I never would have given him one
" single farthing."

2. — Excerpt letter, dated Paris, 20th April, 1823. " My
" other letter was of a more important, and of a most painful
" nature. It replied to your letter of the 16th ult., bringing me
" a state of my late brother's affairs, with all the sad and discre-
" ditable circumstances attending it. * * * *
" My feelings are not those of the moment; they are feelings
" produced by the recollection of what passed between my bro-
" ther and myself, again and again, as connected with the future
" prospects of my family, and they become more deeply rooted
" every day. His having acknowledged this woman for his wife
" five years ago, is so completely at variance with every thing
" which passed between my brother and me from my arrival
" from India in 1818, till the time I last saw him in 1821, that I
" have very strong suspicions that the date of that letter is not
" correct. These suspicions are justified, 1*st*, by my brother's
" own conduct, and by the manner he constantly spoke of this
" woman, (as well he might,) lamenting it deeply, and con-
" stantly desiring to get quit of it by leaving Edinburgh entirely.

" 2*dly*, By his own conduct towards me; and, *lastly*, by the " character of the persons with whom he was connected. These " are not merely my own suspicions. There happens to be at " Paris just now an old brother-officer of my brother's, with his " family,—the most intimate friends my brother had,—they were " in Edinburgh during this disgraceful connection, and on more " occasions than one, circumstances occurred which shewed my " brother's determination to be quite the reverse from the act of " his last moments, and leave not the least doubt on their minds " that the letter, which is said to exist, never was written five " years ago; on the contrary, that it was extorted from him when " his thoughts and his mind were turning towards his dissolution. " Every thing conspires to justify these suspicions; and did you " know all as well as I do, you yourself would entertain the " same.

" As to her being habit and repute his wife, I am certain he " never acknowledged her as such to any one of his friends and " acquaintances. I can tell you that it was quite the reverse, " and I have this from good information. That she assumed his " name I don't doubt, — such a woman could do any thing; for " I know more of her than you are aware, and I have no doubt " that this was her object from first to last.

3. — Excerpt Letter, dated London, 14th June, 1823. — " I " have just received your letter of the 7th instant. Your letter " of the 7th and 9th ulto., one of so much importance, I never " received. It has miscarried in France, as it is not to be found " at the Treasury. Your present letter, giving the heads of the " former, is at least very satisfactory on the point which had ex- " cited my feelings, and most naturally, so much, — I mean the " pretended marriage of this woman. I had always, from the " first moment, communicated my suspicions upon this point. I " felt the character of my brother would never stoop to such a " degradation. Every thing confirmed these suspicions, and " from many sources. The very day before I received yours, I

" had a long letter from General Hope on this very subject, as " he knew how important it was to my family. This was volun- " tary from himself, as I had never once mentioned the subject " to him. He stated such facts to me, that I had determined to " desire you to take immediate steps for ascertaining the truth " of this assumed marriage. The question, luckily, is now at " rest, and the truth is out."

4. — Excerpt Letter, dated Calais, 20th January, 1825. — " I " am not to have the benefit of your services. It is one of the " many difficulties which one would think have been designedly " thrown in my way. At the same time, I shall be the last to " ask you to depart from the sacredness of your word or promise. " I would have many excuses for all the trouble I give you, and " without your friendship, I would indeed stand in need of every " indulgence and excuse. Take, however, this test, which is " the best and true guide for judging of others, — place yourself " in my situation, and with my family, — see yourself surrounded " by the same difficulties, — beset by the same obstacles, — " forced into many privations, — the future hereditary interests " of your children attempted to be extorted from them; — ask " yourself these things, — look to the source whence all this has " been heaped upon my head, — and then say, would you or " would you not act as I am doing, and follow the same line of " conduct, to prevent the interests of your children from being " trampled upon by persons so utterly worthless?"

II. A letter from Dickie to Archibald Campbell, London, dated 11th March, 1823, in these terms: — " Mr Bowie has pro- " bably informed you that the late Mr Hamilton has left a widow " and four children, and as they have little else to depend on, " his friends are desirous of obtaining the usual government " pension for them. It is proper to mention that Mr Hamilton " was not married according to the rites of the church, but the " lady holds a letter from him, written upwards of five years " ago, declaring her to be his wife, since which they have chiefly

" resided together, two of the children have been born, and she " was considered in the neighbourhood by habit and repute as " his wife, which by our law constitutes a legal marriage, en- " titling the widow and children to all their legal rights.

" In these circumstances, I would be glad to be advised by you " as to the mode of application to the War-office for the pension " for the widow, and allowance for the children, and what certi- " ficates are requisite."

III. A letter from Dickie to John Pringle, Banff, dated 5th May, 1825, in these terms: — " I ought long ere now to have written " you regarding the affairs of our late friend Mr Archibald " Hamilton. He left a settlement and codicil, of which I send " you a copy, in favour of his illegitimate children, and their " mother Mary Clark, and his brother Thomas, and appointed " Mr Campbell of London, yourself, a person of the name of " Gilbert, and me, his trustees."

The documentary evidence tendered for the respondents consisted, 1st, Of an Extract from a memorandum book which had been kept by John Harvey, W. S. the person referred to by Mr Dickie in his deposition, as having been present at the reading of Dr Hamilton's will, which was in these terms: —

" *February* 23,

" 1823. — Died — St Leonards, Mr Archibald Hamilton, late " surgeon, 92 regiment — buried West Church — left " two daughters and two sons, twins, Archibald and " James, by Mary Clark, whom he owned for his wife, " by a letter dated ( ) after the birth " of the two daughters, but long before the birth of the " twin sons; — Failing of the Wishaw family, Archibald " will succeed to the title of Lord Belhaven and Stenton, " if his mother's marriage shall be established. Wit- " nesses at reading / opening the letter, John Dickie, Esquire, " W.S., Hope Street; John Harvey, W.S., 23, Rose

" Street; John Gilbert, pawnbroker, 39, Tolbooth " Wynd, Leith; Mrs Mary Hamilton, the widow, and " the Misses Elizabeth and Nelly Hamiltons, sisters of " the deceased. The letter of acknowledgment of mar- " riage was read in the house at St Leonards, after the " funeral, and given up to Mrs Hamilton. It had been " prievously left in the charge of Mr Dickie by the de- " ceased. Major of brigade, J. Lindsay, 23, Dundas " Street, was Dr Archibald Hamilton's particular friend " and confidant.

" 1825. — Mrs Hamilton proved her title, — obtained the pension " as a surgeon's widow, L.50, — and within these few " months married John Gilbert, May, 1825."

On the 27th February, 1839, the Lord Ordinary, (*Cockburn*,) pronounced the following interlocutor: — " The Lord Ordinary " having heard the counsel for the parties, and considered the " closed record, Finds that all objections to the admissibility " of evidence have been abandoned on both sides: Repels the " defences, and decerns in terms of that conclusion of the libel, " which concludes that the defenders are not the lawful children " of the deceased Archibald Hamilton, the brother of the pur- " suer: Finds the pursuer entitled to expenses; appoints an ac- " count thereof to be given in, and, when lodged, remits to the " auditor to tax the same and to report."

The respondents reclaimed, and on the 22d of November, 1839, the Court (First Division) pronounced the following interlocutor: — " The Lords having advised this reclaiming note, " and heard counsel for the parties, alter the interlocutor re- " claimed against; sustain the defences; assoilzie the defenders " from the conclusions of the libel, and decern: Find the de- " fenders entitled to expenses; appoint an account thereof to be " given in, and when lodged, remit the same to the auditor to " tax and report."

The appeal was against the interlocutor of the Court.

Mr Solicitor-General and Mr Gordon for appellant. — I. The evidence tending to shew marriage between the parties by habit and repute is so divided in character, so little calculated to support a continuous and uninterrupted reputation, that it may be entirely disregarded.

II. The case, then, must depend upon the letter of 26th September, 1817, which at the utmost amounts to an acknowledgment of marriage. Unless the acknowledgment is mutual, it is but the assertion of one of the parties, and even as to him the acknowledgment must be *de presenti*, and with a deliberate intention of the purpose for which it is used. Now, Dickie's evidence shews that marriage was not the purpose of the letter, and that by the inscription on the envelope, in which the letter was enclosed, the letter was not intended to be delivered to May Clark, or to be used in the lifetime of Dr Hamilton.

[*Lord Chancellor.* — What evidence is there of the inscription?]

None but by Dickie.

[*Lord Brougham.* — Why was not Dickie asked for the envelope? it might have had a different inscription from what he states.]

No point was made below upon this.

[*Lord Chancellor.* — Was any objection made to the admissibility of Dickie's evidence as to the envelope?]

None; no point was taken.

[*Lord Brougham.* — The document may be in existence, and yet parole evidence has been allowed as to its terms!]

The letter, coupled with Dickie's evidence in regard to it, shews that Dr Hamilton did not intend to do any thing which should impose on him during his life the consequences of being her husband; and that he merely wished the woman and

children to benefit after his death by her having the character of having been his wife. Neither were the consequences of legitimacy in the contemplation of the parties; all they had in view was the impression to be made on the War Office.

[*Lord Brougham.* — If the man consented that the woman should be his widow, and that only, that would not make a marriage.]

Exactly so. Knowledge of the letter by the woman would not alter the matter, unless it is established that it was intended to take immediate effect as making a marriage; Anderson *v.* Fullerton, *Mor.* 12690; M'Innes *v.* More, *Mor.* 12683.

[*Lord Chancellor.* — Delivery to the woman, if she knew of the particular purpose of the letter, would not be material to make it good for any other purpose.]

In Anderson *v.* Fullerton, no stress was made on the terms of the envelope, and the letter was known to the woman at the time it was written. It was wrapped round a sealed packet, having on it "not to be opened till after the decease of George Fullerton," and four witnesses swore that the woman knew of the letter in the life of the man.

[*Lord Campbell.* — The Court went there on the assumption that the woman had consented that the letter should not operate till after the man's death.]

There was no evidence in the case of that; they went upon this, that the letter remained in the power of the man, and was revocable so long as it did so; and in this case the letter never was delivered to the woman, but was delivered to the agent of the party who made it, and remained with the agent till the party's death.

[*Lord Campbell.* — If the letter constituted a present marriage, with consent interchanged, custody by the husband would not matter.]

That brings us to the evidence in regard to the circumstances attending the making of the letter. Dickie swears that the

Doctor said he would not make the woman his wife, and therefore would not deliver the document into her possession. Unless Dickie's evidence is entirely to be disbelieved, marriage *de presenti* was not the object of the letter, and this is confirmed by what passed afterwards; the letters written by the Doctor to the woman, it is not now denied, were originally addressed to "Mr" Hamilton, instead of "Mrs" Hamilton, as they now purport, and this, it cannot be denied, is a usual course in Scotland where letters are addressed by a man to his mistress; and in no one of the letters but that founded on, nor in any other written document, does he call her "Mrs" Hamilton, or his wife. Again, how is it possible to reconcile the supposition that the letter was delivered to Dickie in the view of marriage, with the terms of the codicil written only a few days before death, in which the woman is called "May Clark," and the children, "my four children by "her;" these expressions are perfectly consistent with Dickie's account that the pension was the object of the letter, but quite inconsistent with the notion of marriage. These circumstances, with undoubted evidence of birth in bastardy, give a strong presumption against marriage.

The Judges in the Court below went upon the notion of an attempt to cheat the woman.

[*Lord Chancellor.* — They allude to the expressions in conversation with Dickie as to "pleasing and satisfying" the woman.]

If Dickie was right, as to the letter not being likely to procure the pension, then it might nevertheless please the woman to see the Doctor's intention towards her, and in this view he might use the words as to pleasing and satisfying, but it by no means follows that he meant to please her by giving her the *status* of his wife. There is no evidence of any demand by her to be acknowledged as his wife, and Dickie, in another part of his evidence as to what took place in the Doctor's bed-room during his last illness, says, the request was to deliver the letter after his death. It is no where shewn that the woman was a party to the making of the letter, and if the evidence of the Waudbys, which is in

many respects contradictory and incredible, be laid out of view, there is no evidence that she was at any time previous to the death acquainted with its contents. All, then, that appears is, that she knew of the existence in Dickie's possession of a letter which, from that person's evidence, was made for the purpose of obtaining the pension only.

Pemberton and Kelly for respondents. — I. We do not rely on the letter of 26th September, 1817, alone, but on the letter, coupled with the circumstances. There cannot be a doubt that up to 1817 the connection between the parties was illicit. In that year Dr Hamilton, desiring to continue the connection, and to avoid a repetition of the proceedings in regard to the maintenance of the children, wished to change its external appearance. He accordingly wrote the letter in question, and from the month of May in that year, he lived with her in the same house, and visited, and was visited, as if she were his wife. At first his sisters disapproved of the connection, but afterwards they became satisfied, as is shewn by the letters which Dr Hamilton wrote to Mrs Hamilton, desiring her to pay money to his sisters, and not to speak to them of his discomfort in his brother's house. This proves that he was aware of such a degree of communication existing between her and his sisters as might lead her to divulge this; and no one witness speaks to any fact as having occurred in the presence of Mrs Hamilton, which was inconsistent with her being a wife.

[*Lord Campbell.* — Are you contending for habit and repute as a substantive ground of marriage, independently of the letter?]

Yes; our case is, that whatever Dr Hamilton did with his own relations, he never did any thing in the woman's presence inconsistent with her being his wife.

[*Lord Brougham.* — What you say is, that to make habit and repute partial, the acts making it partial must be done in the presence of both parties.]

That is what we say, and if we are right, no part of the

evidence shews that the woman was ever treated by the man in her presence so as to imply her consent, in any way derogatory to her character as his wife. The marriage was to be clandestine as regarded his brother, because he was not likely to approve of it, as his letter to Dickie shewed; accordingly the marriage was not acknowledged by the Doctor to his friends in the fashionable part of the town, through whom the knowledge of it would soon have reached his brother; and the letters from London were for the same reason addressed to himself, not to the woman; but throughout his other society, that in which the woman mixed with him, she was invariably treated as his wife, whatever reports to the contrary there might have been at one time among the gossips of the neighbourhood. Laying aside, therefore, the letter of September, 1817, there is sufficient in the case to establish marriage by habit and repute.

[*Lord Campbell.* — Is there any authority for a distinction between public and private habit and repute? Where there is a clear contract, its validity is not dependent on what either of the parties may do, but if it depend on habit and repute, the question may be, whether it ought not to be pure.

Lord Chancellor. — If habit and repute is broken in upon, that is, if there be a different habit and repute among different people, there is an end of marriage by reputation.]

II. The letter of 26th September, 1817, is sufficient to infer a marriage, if proved to have been communicated to the woman, and assented to by her, Hoggan *v.* Craigie, *M'L.* and *Rob*, 965. The evidence shews that it was produced by the party with whom it had been deposited, and that it was communicated to the woman in the lifetime of the maker. Coupling this with the evidence as to the manner in which they lived, it is impossible to say she did not adopt him as her husband. The burden of shewing that the purpose of the letter was other than that which it purports, lay upon the appellant, but he has in no degree proved

that the woman was any way cognizant of, or assented to, the fraudulent purpose; and unless she did so, the mental reserve, or fraudulent purpose of the man cannot affect the question.

[*Lord Brougham.* — If the letter was communicated, and she did not assent to the fraudulent purpose, but did to the other lawful purpose, this must be proved.

Lord Chancellor. — You say she assented by her mode of acting.]

Yes; that is proved by the habit and repute; and the communication is established by Dickie's evidence. What Dickie says as to pleasing and satisfying could only have reference to marriage, for he had already told Dr Hamilton, that unless the letter made a marriage, it could not make the woman his widow, so as to get the pension he desired, and what took place on the Doctor's deathbed is conclusive upon this subject. The Doctor could have no object, then, in merely pleasing and satisfying the woman in the way suggested, by requiring from Dickie an acknowledgment that he held the letter. His only object could be to protect her against the disappearance of that letter, and the loss of her just rights, and Dickie viewed the matter in that light, for he appears by the answers of the appellant to his letters, to have represented the connection to have been a marriage, at least until the latter part of the correspondence, when for some reasons, probably the fear of embroiling himself with the appellant, he had been induced to alter his account of the matter. Moreover, what Dickie says as to pleasing and satisfying is confirmatory, that the letter was communicated, for without being seen, how could it either have pleased or satisfied.

Solicitor-General in reply. — Habit and repute must be notorious among the neighbourhood and friends of the parties. If it do not exist among the friends on both sides, then it is partial, and that is none at all for the purpose suggested, Thomas *v.* Gordon, 7 *S.* and *D.* 872.

[*Lord Campbell.* — The declaration of the man there broke in upon the habit and repute.

Lord Chancellor. — Habit and reputation is the conduct of the parties, and the reputation among their friends.]

Whatever reputation there might be in the neighbourhood where he lived, there was none among the friends and relations of the man; and if the sisters did occasionally visit the woman at her house, there is no evidence that she ever visited them at theirs. The letter itself will not make a marriage without the circumstances in connection with it; but setting Waudby's evidence aside, there is no more than a supposition by Dickie that the woman was acquainted with the contents of the letter, and unless acquainted with them, how could she assent. It would be of most dangerous precedent to allow a marriage to be set up on such evidence as either Waudby's or Dickie's.

[*Lord Campbell.* — There is great danger, certainly, in establishing such a marriage, but there is as great danger in impeaching such a written document by parole evidence.]

I should have thought otherwise. There is hardly a case where documents have been extorted for another purpose than what they shew, in which parole evidence has not been allowed.

[*Lord Brougham.* — The parole evidence of the respondents is to prove assent in harmony with the document, yours is to overset, or against it.]

It is difficult now to refer to authorities.

[*Lord Campbell* and *Lord Brougham.* — No necessity certainly. You may impeach the document in the way you attempt.]

LORD CHANCELLOR. — My Lords, this was an action brought by the pursuer for the purpose of obtaining a declaration of the illegitimacy of the defenders, on the ground of their parents not having been married. The Lord Ordinary pronounced an interlocutor against the legitimacy, from which interlocutor there was an appeal to the Court of Session, and, after argument, the

Court of Session, by an unanimous judgment, reversed the decision of the Lord Ordinary; from that judgment of the Court of Session an appeal has been brought to your Lordships' House.

My Lords, there was one ground insisted upon on the part of the defenders that has utterly failed. I mean the ground of defence resting upon habit and repute. The evidence of habit and repute was conflicting, and divided to a great extent, and it is impossible, therefore, that evidence of that description could be made the foundation of a decision establishing the *status* of marriage. That part of the case standing by itself may be left out of our consideration.

The question, therefore, rests solely upon a document amounting to an acknowledgment of marriage, and the evidence, principally of Mr Dickie, connected with that document.

The facts of the case, for the purpose of introducing the evidence, are very shortly these: — Dr Archibald Hamilton had been a surgeon in the army. About the year 1814 he retired from the service. He was in very humble circumstances, and went to reside at Edinburgh. He lived for a considerable time with his sisters in that city. During that period he formed a connection with a woman in an inferior condition of life, of the name of May Clark, who lived in the Canongate, and by whom he had two children. Those children were avowedly illegitimate. He was obliged to give security to the district or the parish for their support. But about the year 1817, in the month of May in that year, a considerable alteration took place in his position — in his mode of living. He left the residence of his sisters, and took a house, or apartments, consisting of two or three rooms, in Brown Street, in the Pleasance, and removed there. May Clark removed from the Canongate with the children, and lived with him in Brown Street. He resided there for three years, and lived afterwards, I think, in the Crosscauseway, and, subsequently to that, in St Leonards, and in the year 1823 he died.

From the time that he removed to Brown Street he constantly lived with May Clark and with her children, and, subsequently to that removal, he had two other children, two sons, twins; and the four children are the defenders in this action.

I have mentioned, that in the month of May, 1817, he went to Brown Street, and he was accompanied, as I have stated, at this time by May Clark and the children. Very shortly after that period he applied to Mr Dickie, a writer to the signet, with whom he was in some way connected through his brother, the present pursuer, who had employed him in his profession. He applied to him for the purpose of obtaining a writing, by which May Clark should be secured a pension, as the widow of an army surgeon, in the event of his death. Mr Dickie informed him that that could not be done unless he married her. To that he replied that he never would do that. But, however, after a little time, he said to him, "I wish you would draw me out the form "of an acknowledgment of marriage between me and May "Clark," and he added, "It will please and satisfy her:" Mr Dickie accordingly drew out such a form of acknowledgment, and having obtained that he took his leave.

In about a week or fortnight afterwards he returned to Mr Dickie, with an acknowledgment, in his own handwriting, in these terms: — "To May Clark, Edinburgh, September 26, "1817. My dearest May, I hereby solemnly declare that you "are my lawful wife, though, for particular reasons, I wish our "marriage to be kept private for the present. I am your affec- "tionate husband, Archibald Hamilton," — and it was addressed on the back, to "Mrs A. Hamilton, Brown Street, Pleasance." He delivered this to Mr Dickie, requesting Mr Dickie to take care of it, to shew it to nobody, and to take care, that in the event of his, Mr Dickie's death, it should come into no person's possession but Mr Hamilton's. Accordingly, in the presence of Mr Hamilton, he put this paper in an envelope, sealed it up, and endorsed it in these terms: — "To be delivered into the hands

" of Archibald Hamilton, Esq., unopened." Mr Dickie expressed an opinion, that a secret transaction of this nature would not be sufficient to entitle the widow to the pension, to which Mr Hamilton replied, " at all events it can do no harm."

Now, stopping there for the present, the main question is this: Was this paper shewn to May Clark? It was written for the purpose of pleasing and satisfying her. The inference, therefore, from that declaration, (and it must be remembered that Mr Dickie is an unwilling witness on the part of the defenders,) the inference from that declaration would be that it was shewn to her. I think, looking at the style of the paper, and the terms of it, it leads strongly to the probability that it was shewn to her. But I think the case does not rest there with respect to its having been communicated to May Clark; because, upon the death-bed of Dr Hamilton, Mr Dickie attended to write his codicil, and, upon that occasion, May Clark, the mother of the defenders, being present, he said to Mr Dickie, " You know you have a " letter from me, addressed to May Clark; upon my death, " when all is over with me, you must deliver it to her." Mr Dickie says, from the manner in which he expressed himself, he understood that Mr Hamilton wished, in the presence of May Clark, to obtain from him an acknowledgment that he was still in possession of that paper. May Clark made no observations as to the letter; did not ask what it related to, or what the contents of it were. This leads, therefore, to the inference that she knew what the paper was, and that this was done to satisfy her at that period, that this gentleman, Mr Dickie, still continued in possession of that acknowledgment.

Again, there is another circumstance that is material to be adverted to. After the death of Dr Hamilton, Mr Dickie attended after the funeral, and produced a settlement and a codicil, which was read in the presence of May Clark and some of the members of the family, and also produced this paper and read it. Mr Dickie says, he does not recollect that he read it;

but Mr Harvey, a writer to the signet, whose diary was produced, which diary, according to the law of Scotland, would be evidence, states that it was read. It does not appear that May Clark expressed any surprise, but received it as a circumstance that she was already acquainted with.

Now these circumstances lead me to the conclusion, that the strong probability is, that this paper was communicated to May Clark. If it was communicated to her and she assented to it, and she continued to cohabit with him to the time of his death, and had by him children, there can be no doubt that, by the law of Scotland, that would be a marriage.

But then it is said, (and that was one of the main arguments in the case,) that the paper was never delivered, that it was never out of the possession of the party, Dr Hamilton; that Mr Dickie took it as his agent, and held it as his agent; that Mr Dickie's possession therefore was his possession, and that the instrument therefore was wholly inoperative. But if the paper was shewn to Mrs Hamilton, and she assented to it, and she afterwards cohabited with him upon the footing of that paper, and upon the foundation of it, then she had an interest in that paper. Had it remained in the possession of Mr Hamilton, and not been delivered to Mr Dickie, he would have held it for himself, and as trustee for her; and when it was handed over to Mr Dickie, though he stood in the first instance as agent of Mr Hamilton, he would, as far as the possession of this paper was concerned, have held it as agent for both of them; as agent for him, and as trustee for her. Therefore, I apprehend, that if we come to the conclusion that this paper was communicated to her, and she assented to it, (and if it was communicated to her, no person reading this paper can for a moment doubt that she did assent to it,) that, under these circumstances, would constitute a marriage.

It is very material to consider in what light Mr Dickie viewed the transaction immediately after the death of Dr Hamilton. He wrote a letter on the subject of it to the present pursuer, and

represented it as a legal binding marriage. That letter is not forthcoming. It is not produced among the documents, and we do not know, therefore, the precise terms of that letter. But we have the answer of the pursuer to the letter, we have two letters written after that letter was received, referring to it, and it is quite obvious, from those letters, that Mr Dickie had represented to the pursuer that the marriage was a legal binding marriage, according to the law of Scotland. At a subsequent period, he, being connected with the pursuer, seems to have altered his opinion, and has styled it a pretended marriage. But, taking all the circumstances of the case into consideration, I agree entirely with what was expressed so strongly by the Judges of the Court of Session, that his evidence, so far as it goes against the defenders, is to be received with great suspicion and caution. For he not only represented it to be a valid and binding marriage immediately afterwards to the pursuer, but he represented it to be a valid and binding marriage to Mr Campbell, for he wrote a letter to Mr Campbell, stating, in terms, that by the law of Scotland it was a legal and binding marriage, which entitled her to the widow's pension, and that letter was written for the purpose of obtaining the widow's pension. I think, taking all these circumstances into consideration, considering the relation in which Mr Dickie stood to the pursuer, and notwithstanding that relation, his having stated in his evidence that he had no doubt this letter was communicated to May Clark, that we cannot but come to the same conclusion at which the Court of Session arrived, that the letter was communicated to her, and that she assented to it.

But it is stated that he was a proud man, a high-minded man, and that he never would have degraded himself by such a connection. But at least, this is true and certain, that he intended, after his death, that she should be represented as his widow. He intended, after his death, therefore, that she should be considered as having been his wife, and therefore, his pride was sufficiently satisfied by concealing, during his lifetime, the circumstance of

the marriage, and for that purpose, he took precautions which seem to have been sufficiently effectual.

Again, the same witnesses, who represent him as being a high-minded man, as being a proud man, and that he would not degrade himself by a connection of this kind, state that he was an honourable man; and yet, if we are to consider that this was not a marriage, that he was not married to May Clark, what is the inference? That he intended to commit a fraud by enabling her to represent herself as his widow, to represent that she had been married to him in order that she might obtain a pension. How much easier is it to reconcile the different parts of this character by assuming what is the probability, and the strong probability, of the case, that he married her — that it was his intention to keep that marriage secret, because he knew it would bring them into conflict with his relations, and make him the subject of mockery to persons with whom he was connected during his lifetime, but that he had no scruple whatever that it should be avowed, after his death, that he had married her, and that by these means, these honest means, he would secure to his widow a pension. It appears to me that that is the true view of the case. That was the view of the case taken by the Court of Session, and it is the view that I have taken after a careful consideration of these papers.

There is one observation made by the Court of Session which I think material; it is a circumstance to lead us not to view very favourably the course of conduct pursued by the present plaintiff. No proceedings were instituted for a period of twelve years after the death of Dr Hamilton. During the whole of that period the pursuer lay bye, and did not question the legitimacy. It is not a very favourable circumstance in support of his claim, and it was not very just to the defenders, because the effect of it might have been to deprive them of evidence most material for the purpose of supporting their defence. I think, that under all the circumstances, I shall be justified in advising your Lordships to

confirm the unanimous decision of the Court of Session in this case, with costs.

Lord Brougham. — My Lords, I entirely agree in the view which my noble and learned friend has taken of this case, in the arguments by which he has so clearly and satisfactorily supported that view, and in the proposition which he has made to your Lordships as the result of it, namely, to affirm the present judgment, with the costs of the appeal.

My Lords, habit and repute being, as my noble and learned friend has stated, and for the reasons he has assigned, entirely laid out of view in the case, the question really turns upon that paper which my noble and learned friend has read, the letter addressed by Dr Hamilton to May Clark, in which, by present words, by *verba de presenti*, he acknowledges her as his wife. Though he gives that paper into the hands, and into the custody, of his agent, Mr Dickie, Mr Dickie keeps it afterwards in the capacity, which I think has been most justly stated and proved by my noble and learned friend, not merely as the agent of the bailor, the party giving him the document, Dr Hamilton, but as in the nature of a trustee, if not agent, for May Clark, to whom the paper was addressed.

My Lords, it will not be safe for parties, though that is not the case here, but it will not be anywise safe for parties minded to practise a fraud upon the world, in Scotland at least, to hold themselves out as man and wife, much less to execute an instrument, in which they are represented as taking one another as man and wife, and yet to say, and to rely upon that assertion, and even to afford proof of it by acts done at the time, and declarations contemporaneously done, that they did not intend this as a real marriage, but only as a fraud upon the community, by representing themselves as married persons, for any purpose which they might have in view. I give no opinion as to what would be the law in that case, though I may have very little doubt about it; suffice it to say, that it would not be safe for parties to attempt

any such thing, expecting thereby to release themselves from the matrimonial obligation. But that is not this case. The question here only is, Did both parties concur? Was this letter known to May Clark? And did she, (for that is no doubt essential,) in reality assent to the contract which this letter purports to make between her and Dr Hamilton? For it is perfectly clear, I hold it to be past all doubt, in Scotland at least, that if a man says to a woman, "I take you for my wife," and she assents, and says, "I "take you for my husband," she really intending, (the case I have already put is that of neither party intending, but both concurring in a fraud,) but she really intending to take him for her husband, though he may all the while only intend to deceive her, or to deceive the world, or to practise a fraud for any purpose, it is past all doubt that she receiving the proposition, and really assenting to it, he shall not be heard to say that he did not mean it. He has contracted a marriage with her as completely as if he had really intended to contract it, and not merely attempted to compass a fraud.

But it is said that his only object was to obtain a pension for her by making *her* his widow, whom during his life he did not intend to make his wife. The answer to that is, that he could only make her his widow, and give her those rights after his death, by making her his wife, and then the question comes round again to this, Did she receive this paper, and receiving it, did she give her sanction to it?

Now, my Lords, I take the evidence to be quite clear that she must have received this paper. In addition to the circumstances referred to by my noble and learned friend which prove that, it is proved by what passed at the time, and is no matter of dispute, for when it was said, "If you do not mean it as a marriage, it "will have no effect," his answer was, "Never mind, it will "please and satisfy her." Now, could it please and satisfy her unless it were communicated to her? And whether it was communicated by actually putting the paper into her own hands that

she might peruse it, or by reading it over in her presence, or after having written it, and given it to Mr Dickie as a kind of common agent between them, by his holding it and communicating the contents to her, the declaration at the time that it would please and satisfy her, clearly shews, that it was intended, that in one way or other she should come to the knowledge of the contents. In either way the declaration of marriage was communicated to her, and the whole evidence in the case leaves it perfectly clear that she must have assented to it. Indeed, the presumption would be so strong that she would, in those circumstances, give her ready and immediate assent to it, that it would require strong proof to the contrary, strong proof of refusal and dissent, to make it possible to credit the assertion, if indeed that were made, (I doubt its ever having been made,) that if the knowledge of its contents on her part is admitted, either by delivery, or by reading it to her, or by perusal of it, she did not at once assent to take him for her husband.

My Lords, a good deal of observation was made upon the evidence of Mr Dickie. I do not approve of the conduct of that gentleman; much the reverse. I agree in much that was said respecting him in the Court below; but at least we are entitled to believe those parts of his statement which receive confirmation from the strong probabilities of the case, the circumstances of the parties, and other evidence existing in the cause; and I believe it so far as to credit what he says with respect to the knowledge intended to be conveyed to May Clark. But I also cannot lay out of mind the circumstance that he, being a man of business, a professional man, and knowing, as every person in the profession generally knows, what the Scotch marriage law is, treated it as a marriage, for a certain time at least, and that he could not so have treated it unless the paper had come to the knowledge of May Clark, and by her been assented to. It clearly proves to me that he knew that she had known of it, and that he knew she had assented to it.

Upon the whole, therefore, my Lords, I am of opinion that the judgment of the Court below is right, and that in the terms of my noble and learned friend's proposition to your Lordships, the judgment should be affirmed, with the costs of the appeal.

Lord Campbell. — My Lords, I am entirely of the same opinion with my noble and learned friends who have preceded me. I have considered this case with very great attention. To induce one to do that, it was not at all necessary to be told that a Scotch Peerage was involved in the question. It was enough to consider that the legitimacy of the children, and the status of a respectable woman, who had appeared in the world as the legitimate children and as the wife of Dr Hamilton, for twelve years, was to be decided by a judgment of your Lordships' House.

Now, my Lords, the onus being upon the pursuer, I think that he has discharged himself of that in the first instance, by shewing, that down to the year 1816, Dr Archibald Hamilton and May Clark certainly lived together without being married, and that the two children who were then born were living with them. The onus is thus cast upon the defenders, but I think that they have effectually supported that onus.

They first relied upon habit and repute. I agree entirely that that cannot be justly relied upon. The marriage law of Scotland is so exceedingly well settled, that I need not remind your Lordships, that habit and repute, to constitute a marriage, must be uniform; the acts of the spouses must all be consistent with the notion of their being man and wife. Now, although in one part of Edinburgh, Dr and Mrs Hamilton appeared to be married, in others they appeared to be in the situation of a mistress living with her maintainer.

But then, my Lords, when we come to the letter to which my noble and learned friends have referred, it seems to me that that affords satisfactory evidence of the marriage. I think that the fair inference from the examination of the witnesses is, that the letter

was communicated to May Clark at the time when it was written, otherwise it would not have satisfied his intention. But at all events, there is direct and positive evidence that it was communicated to her in the lifetime of Dr Hamilton, during his last illness; and she clearly assented to it by living with him as she had previously done — she clearly assented at a time the assent was necessary. Assent might be proved without actual cohabitation or consummation. It was decided in the case of M'Adam, where there was a contract by *verba in presenti*, that consummation is not necessary, by the law of Scotland, to establish a marriage. But it is necessary, in this case, to shew that there was an assent, and with that view, I apprehend, that my noble and learned friend on the woolsack, drew your Lordships' attention to the circumstance, that they had lived together and had several children.

Then that being so, the onus is now transferred to the pursuer. He must make out his case. Now, how does he undertake to do that? If he could really have shewn that this was a mere contrivance, that no use whatever was to be made of the letter till after Dr Hamilton was dead, that they were not to live as man and wife during his lifetime, and that it was only to be used after his death, for the purpose of obtaining a pension for his widow, and thereby committing a fraud upon the government, I humbly apprehend, that that would not have amounted to a marriage contract. But, my Lords, how is this proved on the part of the pursuer? It must be proved, for if this paper was communicated to May Clark, the onus lies upon the pursuer to shew that she was a party to the fraud, but of that there is not one tittle of evidence. Even supposing that Dr Hamilton's object might have been to commit a fraud upon the public, and to obtain a pension for this woman with whom he had lived, upon the footing that she was his wife, after his death, without having been his wife during his life, yet May Clark was no party to

that; and I apprehend that it would be indispensably necessary in order to deprive her of her status of wife, and to bastardize her issue, that it should be shewn that she was cognizant of, and that she consented to that fraud.

There being no evidence whatever, my Lords, to implicate her in this alleged conspiracy, and it being satisfactorily proved to my mind that this paper was communicated to her in his lifetime, and that she assented to it, I think that this paper constitutes a matrimonial contract.

My Lords, with respect to the circumstance which has been very much relied upon, on the part of the appellant, of this being in the custody of Mr Dickie, the law agent of Dr Hamilton, that does not seem to me to be entitled to the slightest weight, because, supposing it to have been *bona fide* written to constitute a marriage between the parties, and to have been communicated to her, and that she had assented to it, and this supposed scheme of a pretended marriage had never been entertained for one moment, what would have been the natural course of things? Why, that Mr Dickie, the law agent of the husband, would have had the custody of this paper.

For these reasons, my Lords, I think that the Lord Ordinary came to an erroneous conclusion upon this subject, and I entirely concur in the interlocutor of the First Division of the Court of Session, establishing the validity of this marriage.

Ordered and Adjudged, that the petition and appeal be dismissed this house, and that the interlocutor therein complained of be affirmed with costs.

HAY and LAW — DEANS and DUNLOP, Agents.

[Heard, 29th April, 1841. — Judgment, 10th August, 1842.]

MARGARET STEWART for herself, and as representative of Jean Stewart, *Appellants.*

JANE STEWART, executrix, and J. W. B. STEWART, heir of JAMES STEWART, *Respondents.*

Deed. — Proof. — Not competent to refer to communings previous to the date of a formal deed, in order to negative the consideration expressed in it.

Ibid. — Delivery. — What held to amount to evidence of delivery of a deed.

Ibid. — Revocation. — Nature of deed held to be irrevocable.

Sale. — Held that the purchaser of the whole executry of a party, as it should exist at her death, in consideration of an annuity, was entitled to retain arrears of the annuity as part of the seller's executry.

BY the contract of marriage of Stewart, proprietor of the lands of Crossmount, yielding a free rental, after payment of taxes and expense of management, of about L.300 per annum, he secured his widow in an annuity of 300 merks, one-third of his household furniture, and two cows, and 200 merks as an allowance for aliment and mournings.

There were born of the marriage two sons, James and Niel, and three daughters, Margaret, Jean, and Isabella.

In 1795, Stewart executed a bond of provision, securing his widow in an additional annuity of L.13, 6s. 8d., and at the same time he executed another bond, providing L.400 to his son Niel, and L.600 payable among his daughters. This last bond he afterwards cancelled.

In 1804, he executed a bond for payment of L.300 to each of his daughters, but without making any provision for his younger son, Niel, whom he had fitted and sent out to India, but this bond he afterwards cancelled; and shortly before his death, a bond was prepared under his directions, for payment of an additional provision of L.100 to his widow, but he died before having executed it. His death took place in the year 1812, and he was survived by his wife, and all his children; his eldest son James being then in Spain with his regiment.

Mrs Stewart brought her husband, at her marriage, a portion of L.1000, and in 1809, she became entitled, under the will of her father, Menzies of Bolfracks, to one-third of his moveable estate, subject to the liferent of three unmarried sisters.

Condie, who had been the law agent, and confidential adviser of Stewart, in a letter to James Stewart, the eldest son, then at Lisbon, of date 9th September, 1813, after telling him what he knew to have been his father's intentions in regard to a provision for his mother and sisters, and asking to have his own intentions upon the subject, added this postscript, — "P. S. Upon reflec- "tion, it occurred to me that your father said something to me "about the provision which he proposed to make in favour of "your sisters. I have, therefore, looked over his letters, and in "one, dated 18th October, 1811, I find he says, 'I think I "'should provide for my wife in the meantime some subsistence, "'in case what may happen. You will, therefore, make a scroll "'and send me before it is finished, and let her have L.100 "'sterling over and above what she is provided in by her con- "'tract of marriage, and her income will amount to L.120, "'besides her share of the household furniture, and some bestial "'— as to the daughters and Niel, that is to be a second con- "'sideration with me. If the mother and me do not make any "'alteration in their chance, each will amount to L.900 sterling, "'including what they are provided in already by me some time

" 'ago. This is all I have to say in the mean time, as to them,
" 'till I see you again.' In a P. S. subjoined to your father's
" letter he adds, — 'As my circumstances cannot admit of acting
" 'otherwise, what occurs to me is to name a handsome portion
" 'to my daughters, and me bound to advance in the mean time,
" 'and to consider how much of the legacy ought to be reduced
" 'to make up my representatives' loss for advancing what the
" 'estate cannot afford otherwise. The last of the Bolfracks
" 'ladies may have a chance to live as long as my daughters.
" 'See what a loss to my heir, to make up to my daughters what
" 'they may expect at such a distant period.' I think you saw
" the letter itself, when in Perth, going over the papers. In the
" event of your making a suitable provision to your sisters, I
" think your mother ought to execute a conveyance, in your
" favour, to whatever part of the Bolfracks money may come to
" her share upon the death of the survivor of your unmarried
" aunts."

James Stewart answered this letter on the 25th September, 1813, in these terms: — " I am very much obliged to you for all
" that you suggest in your letter of the 10th instant, as they
" enable me to give you my own intentions and opinions fully.
" I perceive, from the unbounded thoughtlessness of my brother,
" that, if any thing was to happen me, he would soon have She-
" hallion transported to India, although it is so very high. It
" is, therefore, my determination to secure by a will, L.100
" a-year to my mother, with the house, offices, parks, &c. &c.
" which she now occupies, or a sum adequate to them, if they
" are wanted by my successor. I wish also to have L.1000
" secured to each of my sisters. Under existing circumstances,
" I intend to continue in the army, and I hope to be able to
" contribute to the produce of Crossmount, instead of drawing
" from it, so that, if I exist, in the course of some years, I shall
" free the estate from debt, and pay each of my sisters her por-

" tion. Until I can do this, I shall pay them an annuity, but I " fear I cannot afford to make it equal to the interest of their " portions. I do not know what sum to mention to be equal to " the house, &c. &c. for my mother. Times may alter — would " it be necessary to mention a sum? — I leave it to yourself."

" I hope you perfectly understand me in regard to my inten- " tion of providing for my mother and sisters, and that it is equal " to what my father intended — if not, make it so. In your " P.S. you say that my mother ought to execute a conveyance, " in my favour, to whatever part of the Bolfracks property may " come to her share, in which case, I shall allow her to do as she " thinks proper — my property is my own — hers is her own, " when it comes. I shall do my duty towards my sisters, let her " do hers towards her children. At the same time, I think you " ought to suggest to her, in your official capacity, the propriety " of her executing a deed, of the proportions in which she wishes " it to be shared, when it does come, to prevent family misunder- " standings, for we cannot naturally expect that she is to outlive " three younger sisters."

Condie communicated this letter to Mrs Stewart by a letter in these terms: — " The other day I had a letter from your son, " Captain James; and as I think it will be extremely gratifying " to you, as well as to all the family, to peruse it, I have taken " the opportunity of sending it up to you for that purpose. I " hope that both you and the ladies will be of opinion that, in " your son's present circumstances, the provisions proposed to " be made by him are liberal and handsome, and, indeed, much " more than he could afford, was it not the prospect of your " executing a conveyance, in his favour, of the Bolfracks money " falling to your share, on the death of the survivor of your " unmarried sisters. If I might, therefore, presume to offer an " advice on the subject, I would beg leave to recommend to you " to execute a conveyance of that money, in favour of Captain

" James Stewart, and failing of him, by death, without lawful " children, that it shall go to your daughters. I hope you will " pardon me for taking the liberty of offering the above recom- " mendation — for, as circumstances stand, I think it is doing " your son no more than material justice to convey to him the " money referred to. Crossmount, honest man! was of the " same opinion, though the provisions which he intended to " make for his family were not so liberal as those proposed by " your son. I shall be glad of your sentiments on the subject, " after you consider the matter, before I write Captain James. " — I am, &c."

Mrs Stewart replied to Condie on the 23d October, 1813, in these terms:—" I was favoured with yours of the 7th October; " and having perused James' letter to you of the 25th September, " by which I observed his liberal intentions towards my daughters " and myself, consequently I shall have no objections to execute " a conveyance, in his favour, of L.3000 of the Bolfracks money; " and, failing of him, by death, without lawful children, that it " should go to my daughters. The remainder of that money, with " the moveables, which, I presume, will be about L.500, I shall " retain to myself, to be afterwards disposed of at my pleasure. " Should my son agree to these, there need be no delay on my " part in making up the necessary papers."

In the end of 1813 James Stewart returned home on leave of absence, and on the 24th of February, 1814, he executed a bond in favour of his mother, narrating her contract of marriage and his father's unexecuted intention to make her an additional provision, and bearing to be for love and affection, whereby he secured her in an annuity of L.100, and gave her the liferent use of the house, garden, and parks of Crossmount, or an additional annuity of L.30 in case he should choose to occupy them himself. At the same time he also executed another bond in favour of his three sisters, which narrated the cancelled bond by

their father in 1804, and his intention to increase the provision given by that bond, and for love and affection bound himself to pay L.1000 to each of them at Martinmas 1824, with interest at four per cent till that date, and five per cent thereafter.

Immediately after the execution of these bonds James Stewart returned to his regiment, and Condie thenceforth paid to his mother and sisters the annuities thereby given to them.

On the 16th September, 1817, Mrs Stewart, in the absence of her son James, who was still abroad, but had been at home shortly before, executed a deed, which recited the will of her father, Menzies of Bolfracks, and her husband's unexecuted intention to increase her allowance, and continued thus: — "Considering that, although it was the intention of my said husband to have made a suitable provision for me, in the event of his predecease, yet he was cut off before the necessary deed for that purpose, though prepared, was executed by him; and farther considering that Captain James Stewart, of the 82d Regiment of Foot, now at Crossmount, my eldest son, did, upon the 24th February 1814, execute, in my favour, a bond of annuity, containing a liberal provision for me during all the days of my lifetime, and has also given up to me the use of the stocking in the parks of Crossmount, now occupied by me, on condition that I should execute the deed underwritten: Therefore, and in implement of that agreement, and for the love, favour, and affection which I have and bear for the said James Stewart, and other onerous causes; and considering that he has also granted a bond of provision in favour of Isabella Stewart, now Menzies, spouse to Captain James Menzies of the Royal Perthshire Militia, and Margaret and Jean Stewart, his sisters, containing liberal settlements upon them, in regard his father, though he intended to increase the provisions in their favour contained in a bond executed by him, the 6th June, 1804, had not done so in his own lifetime, I do

" hereby dispone, assign, convey, and make over, to and in " favour of the said James Stewart, and the child, or equally to " the children, to be lawfully procreated of his body — whom " failing, to his assignees — whom failing, to the said Isabella " Stewart, now Menzies, Margaret Stewart and Jean Stewart, " equally among them, their heirs, and executors, all and sundry " corns, cattle, horses, sheep, implements of husbandry, house- " hold furniture, and all other goods, gear, means and effects — " body clothes excepted, which I hereby legate and bequeath to " the said Isabella Stewart or Menzies, Margaret and Jean " Stewart, equally, and to the survivors of them — that shall per- " tain and belong to me at the time of my death: As also, all " and whole my share of all and sundry the foresaid gold and " silver, coined and uncoined, household furniture, body clothes, " corn, cattle, horses, nolt, sheep, farming utensils, and other " stocking which was upon my said deceased father's farm, and " also all other moveable goods, gear, and effects, that pertained " to him at the time of his death: as also my share of all and " sundry debts and sums of money, heritable and moveable, that " were addebted, resting and owing, to my said father, at the " time of his death, by bonds heritable or moveable, bills, tickets, " accounts, or any other manner of way whatsoever, and to which " I have right on the death of the survivor of my said sisters — " conform to the disposition of moveables and nomination of " executors, in part before narrated, with the grounds of debt " whereby the same were constituted, and all that has followed " or may be competent to follow thereon: And I hereby nomi- " nate and appoint the said James Stewart and his foresaids, " whom failing, as aforesaid, to be my executors and universal " intromitters with the goods, gear, means, and effects, debts, " and sums of money before conveyed, excluding all others from " the said office: providing always, and declaring, that the said " James Stewart and his foresaids, whom failing as aforesaid,

" shall be bound and obliged to satisfy and pay my death-bed " sickness, funeral charges, and expenses, but also whatsoever " just and lawful debts shall be resting and owing by me, and " any legacy or legacies that I may think proper to bequeath, by " a codicil to be subjoined hereto, or by any other deed under " my hand, providing the whole of the said debts and legacies " do not exceed the sum of L.500 Sterling."

This deed was prepared by Condie, who was still the family agent, and also the agent and commissioner of James Stewart, and after it was executed it remained with Condie.

In the year 1820, James Stewart claimed to possess Crossmount, and in consequence Mrs Stewart and her daughters left it to reside elsewhere, and from that time Mrs Stewart was paid the additional annuity which James had stipulated to pay her in that event, until her death, which took place in March, 1827.

On the 24th of September, 1824, Mrs Stewart executed a deed, which stated the cause of granting in these terms: — " Considering that, by disposition and deed of settlement, dated " the 16th day of September, 1817, I, for the causes, and with " and under the burdens and provisions therein specified, " assigned, disponed, conveyed, and made over to, and in favour " of, Captain James Stewart, my eldest lawful son, and to the " child, or equally to the children, to be lawfully procreated of " his body, whom failing, as therein mentioned, all and sundry " corns, cattle," &c. (adopting the words of the deed of 1817.) " And I, by the aforesaid disposition and deed of settlement, " nominated and appointed the said James Stewart, my son, and " his foresaids, whom failing as aforesaid, to be my sole executors, " but burdened always with payment of my deathbed sickness, " funeral charges, and expenses, and also with payment of " whatever just and lawful debts should be resting by me, and " any legacies that I might think proper to bequeath, providing " the whole of such debts and legacies should not exceed the

" sum of L.500 sterling: And considering that, at the time I " executed the aforesaid disposition and deed of settlement, I " resided at Crossmount, from whence I removed some years ago, " after the marriage of my said son, to my present place of " abode, where I now reside in family with Margaret and Jean " Stewart, my two unmarried daughters, which I have since fur- " nished chiefly with my own funds, I am therefore resolved to " revoke and recall, as I hereby revoke and recall, the aforesaid " disposition and deed of settlement executed by me in favour of " the said James Stewart, my son, in the whole heads and " articles thereof, excepting in so far as concerns the sum of " L.3000 sterling, part of the means, and which belonged to the " said deceased Alexander Menzies, Esq. my father: as to which " sum of L.3000 sterling, I hereby declare that the said disposi- " tion and deed of settlement shall remain and subsist in full " effect, and the said sum of L.3000 sterling shall be payable to " the said James Stewart and his foresaids, whom failing, as " aforesaid, in manner after-mentioned." The deed, upon this recital, went on to express, that upon a consideration of the propriety of settling her affairs so as to prevent differences, the granter, for love and affection to her daughters and youngest son, and other onerous causes, conveyed to them equally her whole estate whatsoever, and appointed them to be her sole executors, under a proviso, that her son James should be entitled to draw L.3000 out of her share of the estate of her father, and that her executors should be bound to pay her debts.

On the 8th of May, 1826, Mrs Stewart wrote the following letter: — " My dear daughters, As both you and myself are now " about to remove from their (our) house to the town of Perth, " I think it right and just to declare that I give over to you, " freely and voluntarily, from this day, every article of furniture " belonging to me here, to enable you to furnish our new abode " as you shall think fit: all which will be then your property,

" and you are to keep this letter as a proof of it. I ever remain, " my dear Margaret, and my dear Jean, your affectionate " mother, Jean Stewart." And on the 18th July, 1826, she wrote this other letter: — " My dear daughters, To prevent " the possibility of any dispute or difference arising from the " circumstance of the furniture, &c. in the house which you and " I at present occupy, being your property, and not mine, I " have considered it proper to declare, that I gave and delivered " to you, at the time of our removal from Friarton to this house, " the whole household furniture, books, plate, pictures, and " linens, then belonging to me, to be thenceforth used and dis- " posed of by you as your own absolute property; and that, " although I pay the house-rent, I have no right to the furniture, " and other articles above specified. I ever remain, my dear " Margaret and my dear Jean, your affectionate mother, Jean " Stewart."

During her life Mrs Stewart placed in the hands of third parties various sums of money, and in particular she paid L.200 to her grand-daughter and her husband Millius, and took from them their bill for the amount, which bill she afterwards indorsed to her daughters, Margaret and Jean.

In January, 1828, James Stewart brought an action against his brother and sisters, and the parties in whose hands the moneys had been placed by his mother, concluding to have it declared, " that subsequent to the execution of the bonds of " annuity and provision by him in favour of his mother and " sisters, or, at all events, after the execution of the deed of con- " veyance and assignment on 16th September, 1817, Mrs " Stewart had no power to execute any deed, to effect gratuitously " a conveyance of her moveables, so as to diminish the amount " of the same at the period of her death, or disappoint the con- " veyance in his favour contained in the deed of 16th Sep- " tember, 1817, or his rights thereunder; and that the deed of

" settlement by Mrs Stewart, bearing date 24th September, 1824, " and the transferences of money, were in contravention of the " stipulations come under by her in his favour, by the deed of " 16th September, 1817;" and farther concluding, that the deed of 24th September, 1824, the two letters of 8th May, and 18th July, 1826, and the various obligations upon which the transfer of the moneys had been effected, and particularly the bill for L.200, granted by Millius and wife, in the event of its bearing an indorsation in favour of the defenders, should be reduced and declared void. In the course of this action the drafts of the deeds executed by James Stewart in favour of his mother and sisters, and of the deed by his mother in his favour, were produced. The drafts of James's deeds bore the date of 1813 on the back of them, while the deed by Mrs Stewart bore the date of 1814, and this latter draft, in reference to the deed by James, had originally been expressed thus: — " has since the death of " his said father now executed," which (as it stood in the engrossed deed) was altered to " did on the 24th February, " 1814, execute in my favour," &c. " I am resolved to execute " the deed underwritten; therefore, and for the love, favour," &c. This alteration was in Condie's handwriting.

The pursuer pleaded in support of his action: —

" I. The defenders have no title to defend the deed by their " mother of 1824, while they deny that they represent her, and " without undertaking the office of executors, and the liability " for the whole of their mother's debts in terms of that deed. " The only way in which they can impose on the pursuer an " obligation for these debts and the character of executor, is by " admitting his right under the deed of 1817 — they cannot " approbate and reprobate.

" II. The deed of 1817 being onerous, and bearing to be in " implement of an agreement, and of onerous considerations on " the part of the pursuer, was in itself irrevocable, and

" Mrs Stewart was not entitled to execute the settlement " of 1824.

" III. The deed of 1817, being in implement of the arrange- " ment concluded in 1814, under which provisions were made " both for Mrs Stewart and for the defenders, and the defenders " having derived the benefit of the onerous provisions made for " them, the deed of 1817 thereby acquired additional onerosity " in favour of the pursuer, and they are not now entitled to " repudiate it, or to found on the settlement of 1824."

The defenders pleaded in answer: —

" I. The execution of the deed of 1817 by Mrs Stewart, " formed no bar to her executing the subsequent deed of 1824. " The former was not an onerous deed, but a gratuitous and " *mortis causa* settlement, intended to take effect at her death, " and subject to be cancelled or revoked at her pleasure. It did " not vest the pursuer with a right to any part of his mother's " funds and effects during her lifetime, nor restrain her from " disposing of her property, either by gift, conveyance, or " will.

" II. Even assuming that it could be held a complete and " irrevocable disposition and assignation, in so far as regarded " her own share of her father's executry, it would be impossible " to extend the same construction to any of the other subjects " or funds belonging to the granter, as the grant is expressly " limited to what shall pertain and belong to her at the time of " her death."

Before any judgment had been given in this action, Margaret and Jane Stewart, as the surviving executors of their mother, under the deed of September, 1824, brought an action against their brother James, founding upon the deeds of September, 1817, and September, 1824, and alleging that, at the death of their mother, there were three years' annuities payable under the deed of 1817, due to her from Whitsunday, 1824, to Whitsun-

day, 1827, amounting to L.390, under deduction of L.210 which had been paid, and concluding for payment of the balance.

This action was conjoined with the previous action at James Stewart's instance, and on advising cases for the parties, in the conjoined actions, the Lord Ordinary, (*Moncreiff*,) on the 20th November, 1832, pronounced the following interlocutor: — "Finds, that the deed of settlement, bearing date the 28th day "of September, 1824, executed by the late Mrs Jean Menzies "or Stewart, mother of the parties, and the two letters bearing "to be written by her of the dates, respectively, of the 8th May, "1826, and 18th July, 1826, in so far as the said deed and "letters are inconsistent with, and express or import a revoca- "tion or alteration of the deed of settlement executed by the "said Mrs Jean Menzies or Stewart, of date the 16th day of "September, 1817, were *ultra vires* of her the maker thereof, "and are liable to reduction at the instance of the pursuer of "this action; reduces the same accordingly, and decerns, with- "out prejudice to the effect of the said deed and writings in "other respects: Finds, that the other writs called for, and "produced, are also liable to reduction, in so far as it can be "shewn that they operate in defraud of the pursuer's right, "under the said deed of 16th September, 1817: But, in respect "that the effect of these last mentioned writs depends essentially "on certain matters of fact, as to which the parties are at "variance, appoints parties' procurators to be farther heard as "to the mode in which such matters of fact may be ascertained: "Finds, that, *quoad ultra*, the count and reckoning between "the parties, under the conclusions of the summons to that "effect, must proceed on the principles above laid down; but, "before farther answer, appoints the cause to be called."

This interlocutor was adhered to by the Court (*First Division*) on the 29th January, 1833.

Thereafter the Lord Ordinary remitted the cause to the Jury

Roll, and on the 17th May, 1834, ordered the following issue to be tried; "It being admitted, that, after the death of the said "Mrs Stewart, the defenders, Misses Stewart, produced the "receipt or obligation No. 24 of Process, granted by one Rodney "Myllius and his wife, for the sum of L.200 sterling, dated "London, 1st April, 1826, blank indorsed by the said Mrs "Stewart: Whether the said receipt or obligation for L.200, "as above described, was indorsed to, or was held by the said "Misses Stewart, or is now held by the said Miss Margaret "Stewart, for herself, and as representative of her said deceased "sister, Jean Stewart, for onerous considerations?"

The appellants reclaimed to the Court against the interlocutor ordering the trial of this issue, and prayed the Court "to recal "the said interlocutor, to alter the issue, in so far as it throws "the *onus probandi* thereof upon the complainer— to find that "the pursuer is bound to prove his averments regarding the "said receipt or obligation by Mr and Mrs Myllius, and to "direct an issue to be prepared in such other terms as may be "thought proper for trying the question accordingly." The Court, on 11th June, 1834, refused the reclaiming note, and approved of the issue.

The Jury found for James Stewart on this issue, and on the 21st January, 1836, the Court pronounced this interlocutor: — "In respect of the verdict found for the pursuer, decern and "ordain Jean Ann Myllius, and Rodney Myllius, defenders, to "make payment to the pursuer of the sum of L.200, claimed "by the said Margaret Stewart, defender, with interest, as con- "cluded for in the summons, and decern; reserving all questions "of expenses *hinc inde*."

On the 10th March, 1838, the Lord Ordinary (*Cunninghame*) pronounced the following interlocutor: —"The Lord Ordinary "having resumed consideration of this process, with the revised "minutes: *First*, with respect to the claim made by Miss

" Stewart for L.180 sterling, as the alleged arrears of the " annuity which Captain Stewart became bound, by the deed " of settlement of 16th September, 1817, to pay to his mother, " and which is said to have been unpaid to the above extent at " her death, Finds that the said balance, if due, falls under the " executry of Mrs Stewart, and so, upon her death, were claim- " able by Captain Stewart himself, who got right specially to " 'all goods, gear, means, and effects, that should pertain and " belong to her at the time of her death;" and who was, more- " over, by the same deed, named his mother's executor: Finds " that Miss Stewart has failed to condescend on any onerous " right to said arrears sufficient to compete with the said assig- " nation in favour of Captain Stewart by the deed of 1817, " which has been found by the former Lord Ordinary and the " Court not to have been gratuitously revocable by the granter: " Finds, that, in so far as Miss Stewart claims the said arrears " under the settlement subsequently executed by Mrs Stewart " in 1824, her right stands, in substance, reduced by the prior " interlocutors of the Lord Ordinary and the Court, before re- " ferred to — in respect that no onerous cause of that settlement, " in reference to this part of Mrs Stewart's funds, is instructed: " Therefore assoilzies the representatives and successors of Captain " Stewart from this claim, and from the conjoined action brought " at Misses Stewart's instance to constitute the same, and decerns: " *Secondly*, with regard to the conclusions of the action of re- " duction, and count and reckoning, in so far as they have not " been formally disposed of by the former interlocutor of Lord " Moncreiff, of 20th November, 1832 — adhered to by the Court " on 29th January, 1833 — Sustains the reasons of reduction of " the deed of settlement, in so far as it imports a right to any " other subjects belonging to Mrs Stewart at the time of her " death: Finds the pursuer entitled to the sum of L.200 con- " tained in the bill libelled on, granted by Mrs Jane Myllius,

" and Rodney Myllius, to Mrs Jane Stewart, and to any other " funds belonging to Mrs Stewart at the period of her death, in " the hands of third parties, not onerously alienated or burdened: " Of consent, assoilzies Miss Stewart from the conclusions of the " original summons for delivery of the late Mrs Stewart's furni- " ture, and repels the reasons of reduction of Mrs Stewart's " letters of 8th May, and 18th July, 1826, relative to the said " furniture: Finds that no specification has been insisted on by " the pursuers in reference to the general conclusions in the " summons for count, reckoning, and payment, of a balance of " L.2000, and that the pursuer does not now make any claim under " the same; therefore, assoilzies the defender from that conclusion: " *Thirdly*, with respect to expenses of process, Finds, that, as " the leading action in dependence, being the action of reduc- " tion of the second settlement executed by Mrs Stewart in 1824, " was absolutely necessary, and as the conclusions of the sum- " mons were not only resisted *in toto* by Miss Stewart, but " another action raised by the Misses Stewart for payment of " arrears of annuity, the raising of the action of reduction was " necessary and unavoidable, and that the pursuer is entitled " generally to the expenses of the conjoined actions, down to " 29th January, 1833, when Lord Moncreiff's interlocutor was " confirmed by the Court, but under deduction of any expenses " for proceedings during that period in which she succeeded: " Therefore, and with the view of ascertaining the balance of " expenses claimable by each party anterior to 29th January, " 1833, allows each party to lodge an account of their expenses " so far as they allege they were successful, and remits the " account, when lodged, to the auditor to tax and to report: " Finds neither party entitled to expenses subsequent to 29th " January, 1833, and decerns."

The Court, on 30th November, 1838, adhered to this interlocutor.

The appeal was against the several interlocutors of the Lord Ordinary and of the Court, which have been detailed.

Lord Advocate, (Rutherford,) and Sir W. Follet, for appellants. — I. The deed of 1817 is represented by the respondent as having been executed by Mrs Stewart, in consideration of the bonds of provision which he had given to her and her daughters in 1814, and the several deeds are treated as parts of one and the same transaction; but this is wholly unsupported by evidence. The bonds of 1814 contain no reference even to the granting of any correlative deed, and the correspondence of the parties at the time, so far from establishing any demand or bargain by the respondent, of a consideration from his mother, or counterperformance for the granting of these bonds, shews that this was entirely a suggestion of Condie, which, however, the respondent, in the postscript of his letter to that gentleman, of 25th September, 1813, refused to adopt, leaving it entirely to his mother's free will, to do in regard to her property as she might feel inclined. Accordingly, he executed the bonds without regard to what his mother might do, and, by his letter to Condie, of 19th April, 1816, he shews, that even then, two years after the bonds had been executed, he considered his mother as having the free disposal of her own estate. The facts of the case, therefore, shew, that whatever may have been stated *narrative* in the deed of 1817, as to the cause of its being granted, that deed was, in truth, purely gratuitous, and such as the respondent could never have enforced the execution of, had Mrs Stewart been minded not to grant it.

II. The deed of 1817 required delivery to complete and render it binding, *Ersk.* III. 2, 43; it was framed by Condie, the agent of the granter, and remained in his possession after execution, and there is no evidence that the respondent knew of the

intention to make the deed, and still less of its existence after execution. There is not only no evidence of delivery, but there is nothing to raise a presumption of delivery, Irvine, *Mor.* 11576; Brownlee, 10 *S.* and *D.*, 39; Ramsay *v.* Cowan, 11 *S.* and *D.* 967. In the case of Ramsay *v.* Maule, 4 *W.* and *S.* 59, delivery was established chiefly upon the ground of payments having been made under the deed.

III. Farther, the deed was testamentary in form; it gives the granter's estate as it should exist at her death; it contains no warrandice, and makes an ordinary appointment of executors. It was therefore revocable by the granter, notwithstanding there had been delivery, and was revoked by the granter's deed of 1824, Leckie *v.* Sommerville, 18th May, 1819. A testamentary deed, even if it contains a clause renouncing the power of revocation, and dispensing with delivery, is nevertheless revocable; Dougall *v.* Dougall, *Mor.* 15949; Balders *v.* Ireland, 22d December, 1814, 18 *F. C.* 124; Somerville *v.* Sommerville, 18th May, 1819, 19 *F. C.* 730; Miller *v.* Dickson, 4 *S.* and *D.* 822, *Ersk.* III. 3, 84.

IV. The only effect of the deed of 1817 was to give the granter's estate as it should exist after the exercise of her disposal of it in any way, during her life, that she might feel inclined; but there is nothing in the terms of the deed to tie up her hands, and give her a mere life enjoyment. Moreover, the terms used are special in regard to the Bolfracks executry, confining the conveyance to the granter's own share alone; that portion, therefore, which she subsequently derived, under the will of her sister Margaret, was unaffected by the deed, and remained *sub potestate* of Mrs Stewart, and was effectually bequeathed to her other children.

V. If the deed of 1817 is to be held as onerous in respect of the annuity to the respondent's mother and sisters, the arrears of the annuity cannot belong to him under that deed; he cannot be entitled to the thing purchased, and, at the same time, to the price paid for it. Mrs Stewart, in her lifetime, could have sued him for payment of the annuity, and the right that was in her is now in the appellants, as her assignees under the deed 1824.

VI. The Court below laid upon the appellants the *onus* of proving consideration for Myllius's bill for L.200; but as holders of the bill, the presumption of onerosity was in their favour, and this *onus* of rebutting it should have been laid on the respondent.

Mr Attorney General (Campbell,) *and Mr Pemberton for the respondent.* — I. The deed of 1817 was the counterpart of the bonds granted by the respondent to his mother and sisters; it was therefore onerous and irrevocable. The deed of 1824, which was purely gratuitous, was thus in fraud of the deed of 1817, and reducible under the act 1621. *Ersk.* IV. 1. 29. It is not competent to go beyond the express terms in the deed of 1817, to prove its nature, these terms being distinct and unambiguous in themselves.

II. The deed of 1817 was allowed to remain in the hands of Condie, who was the agent of the respondent, and the commissioner for managing his affairs in his absence, and who had prepared the deed under the instructions of the respondent. Delivery to him, therefore, was delivery to the respondent. Ramsay *v.* Maule, 4 *W.* and *S.* 59.

III. To make the deed of 1817 revocable, as being testamentary, it should have contained a reservation of power to revoke, but this is wanting in it.

STEWART v. STEWART. — 10th August, 1842.

LORD COTTENHAM. — The first question, my Lords, in this case is, whether the deed of 1817, under which the pursuer claimed, was a gratuitous deed, or for an onerous consideration; and that depends upon this, whether the executing such a deed by Mrs Stewart, the pursuer's mother, constituted part of the arrangement with him, under which he made provision for his mother and sisters by the bond of provision of 1814.

If the deed of 1817 were alone to be looked at, there could be no question raised, because that deed recites, that the provision so made for her by her son in 1814 was made on condition that she should execute the deed underwritten, and in implement of that agreement, and for love and affection; and considering that he had made such provision for her daughter, and other onerous causes, she assigned to him and his children, or failing them to her daughters, all effects which should pertain or belong to her at the time of her death, and all her one-fifth share of her own father's effects, he paying all her debts and legacies to the amount of L.500.

In this deed there was not any power of revocation, and the appellants, the daughters of Mrs Stewart, claiming under a deed of 1824, which professed to revoke the deed of 1817, except as to L.3000, have never sought to reduce or impeach the deed of 1817, but insist that it was in its nature testamentary, and therefore revocable. But I do not find that they have contended, that if this recital in it be correct, Mrs Stewart, the mother, could have released herself or her property from its effects.

The grounds upon which the defendants contended that the deed of 1824 was to prevail over that of 1817 were, first, that the onus of invalidating the deed of 1824 lay upon the respondent. If that were so, the production of the deed of 1817 would be sufficient for that purpose.

Secondly, that the deed of 1817 was never delivered. If there

had been no other proof of the delivery than the deed of 1824, under which the appellants claim, they would have been precluded from raising this point, as that deed recites, that she had by this deed of 1817 assigned and made over the property to her son, and she professes to revoke and recal the aforesaid disposition and deed of settlement executed by her in favour of her son. There is, however, evidence of the deed of 1817 having been a completed instrument, as it was in the hands of Mr Condie, the agent who acted for both the mother and the son.

Thirdly, the appellants insisted, that the deed of 1817 was in its nature revocable, which they attempted to support by reference to authorities; that instruments properly testamentary, or *mortis causâ*, were always revocable, which assumes the whole question; that the deed was voluntary, and not for any onerous consideration. But they contended, that the deed of 1817 could not be considered onerous, because its provisions went beyond what the pursuer alleged to have been the agreement, and the value which he had given. The question is not, whether the mother received full consideration for what she gave by the deed of 1817, but whether it was altogether voluntary. It appears, indeed, from Mr Condie's letters of the 9th of September and 7th of October, 1813, that the original suggestion was, that the mother should secure to her son the share to which she had become entitled of her own father's estate. But that does not prove what was the ultimate agreement. Indeed, Mrs Stewart's letter of the 23d of October, 1813, in which she offers to settle L.3000 of the Bolfracks money, proves that the original suggestion was not altogether adopted.

The deed of 1817 is the only legitimate evidence of what the agreement was; but the earlier documents, particularly these letters, and the deed of 1814, are important, as shewing that the recital of a consideration was not fictitious, for the purpose of giving an appearance of validity to a transaction really gratuitous, but

that the transaction was one of mutual arrangement, founded upon valuable and onerous considerations.

If, then, such be the true construction of the deed of 1817, and the true result of the evidence of the earlier arrangement which led to it, it cannot be a question but that the attempt to evade the performance of the provisions of the deed of 1817, by the deed of 1824, was inefficacious. In principle this case resembles the attempt made to defeat a similar arrangement in Wienholt *v.* Logan, reported in 7th *Bligh*, page 1; and upon this point the law of Scotland appears to be equally capable of preventing parties from escaping from the provisions of such arrangements.

The fourth and fifth objections, namely, that the effect of the deed of 1817 ought to have been confined to the mother's own share of her father's property, require no observation. Such is not the provision of the deed, which, if it stands, must be carried into execution in all its parts.

It appears to me, for these reasons, that the first and second interlocutors appealed from, which establish the deed of 1817 as against the deed of 1824, are right.

The third and fourth interlocutors appealed from, which regard the form of the issue for trying the title to the L.200, were also clearly right. The affirmative was upon the appellants, who, by an alleged act of their mother, claimed this sum as against the respondent, who, under the deed of 1817, was entitled to it, if such alleged act could not be proved.

The fifth interlocutor, so far as it was appealed from, only gives effect to the verdict as to the L.200.

The sixth and seventh interlocutors appealed from, disposed of the appellants' claim to the arrears of their mother's annuity, and to the costs of the various proceedings in this unfortunate litigation between such near relations.

For the reasons given by the Lord Ordinary, I think that the

appellants' claim to the arrears was wholly untenable, and was properly rejected. And with respect to the costs, I think the arrangement made was quite as favourable to the appellants as the circumstances justified.

It appears to me that all the interlocutors appealed from are right, and that the appeal ought to be dismissed with costs.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors, in so far as therein complained of, be, and the same are hereby affirmed. And it is farther ordered, that the appellant do pay, or cause to be paid, to the said respondents, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is farther ordered, that unless the costs certified, as aforesaid shall be paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence, for the recovery of such costs, as shall be lawful and necessary.

DEANS and DUNLOP — MUNDELL and MARTIN, Agents.

[Heard, 31st May. — Judgment, 11th August, 1842.]

THE HONOURABLE ARCHIBALD MACDONALD and OTHERS, Executors of the deceased ALEXANDER WENTWORTH LORD MACDONALD, *Appellants.*

THE RIGHT HONOURABLE GODFREY WILLIAM WENTWORTH LORD MACDONALD, *Respondent.*

Tailzie. — An heir making improvements on lands, possessed by him under an unrecorded entail, is not entitled to the benefit of the act 10 Geo. III. cap. 51, in regard to the cost of the improvements.

Ibid. — The limitation in the 26th section of 10 Geo. III., cap. 51, does not apply to actions in regard to improvements made by an heir possessing under an unrecorded entail.

Res Judicata. — The plea of competent and omitted, has no place against the pursuer of a reduction, in respect of *media concludendi*, different from those on which the original action was founded.

ALEXANDER LORD MACDONALD was proprietor of entailed and unentailed lands — the entailed lands being held by him under an unrecorded entail. In 1800, he intimated to his brother Godfrey, the father of the respondent, and next substitute of entail, his intention of making various improvements on his estates, and making them chargeable against the heirs of entail under the powers given by the 10 Geo. III. cap. 51.

In June 1815 Alexander obtained decree in an action raised by him against his brother Godfrey, declaring that Godfrey, and the next heir of entail entitled to succeed after him, were liable to his heirs and executors, or assignees, in L.9643, being three-fourths of L.12,857, the amount of expenses laid out by him in improving the estates.

In June, 1824, Alexander died, and was succeeded in his honours and estates, by his brother Godfrey Lord Macdonald.

In 1830, Godfrey brought an action against the appellants, as executors of Alexander, for reducing the decree of June 1815, on these grounds: That it had been obtained in absence — that the statute had not been properly libelled — that evidence of the money expended had not been produced — that the provisions of the statute had not been complied with in many particulars, and that many of the articles of expenditure were not authorized by the statute. That action was dismissed in 1831, by an interlocutor, sustaining a defence that under the 10 Geo. III. cap. 51, the decree of June, 1815, was final, unless appealed against within twelve months of its date.

In October 1832, Godfrey Lord Macdonald died, and was succeeded in his honours and estates, by the respondent.

On the 11th of June, 1836, the respondent put the deed of entail upon record, which to this time had continued to be unrecorded; and in January 1838, he brought an action for reducing the decree of June 1815, upon the several grounds urged in the action, which had been tried by Godfrey Lord Macdonald, and upon the additional ground, which was the *third* reason of reduction in the summons, that the statute 10 Geo. III., cap. 51, did not apply to estates held upon entails not recorded; that therefore the money expended in improvements was not chargeable against the succeeding heirs, and that the decree was "null and inept, "inasmuch as the statute did not apply, and the estate was not "within the scope and provisions thereof, and the action pro-"ceeded, and the decree was obtained on the groundless repre-"sentation of the said Alexander Wentworth Lord Macdonald, "that he was entitled to such decree in terms of the foresaid "statute, and by the wilful concealment from our said Lords "and from the said Godfrey Macdonald, that the alleged deed of "entail had not been recorded, and therefore was not a settle-

" ment of strict entail, to which the foresaid statute is exclusively " applicable."

The pleas in law urged by the respondent in support of this additional ground of reduction were: —

" 1. The entail under which Alexander Wentworth Lord " Macdonald held the lands, not having been recorded during " his lifetime, he was not entitled to avail himself of the provi- " sions of the act 10 Geo. III. chap. 51, which is inapplicable to " any estates, except those held under strict entail executed in " terms of the act 1685, Paget *v.* Earl of Galloway, 24th Feb- " ruary, 1837.

" 2. As the proceedings adopted by Wentworth Lord Macdon- " ald, and the decree following thereon were not authorised by " the act 10 Geo. III. c. 51, but were *ab initio* null and void, the " pursuer is not barred from insisting in the present action of " reduction by the limitation contained in the statute."

The pleas urged by the appellants in defence were: —

" 1. The action is excluded by the decreet pronounced in the " prior action of reduction, which now makes *res judicata* in " favour of the defenders, as the representatives of the late " Alexander Wentworth Lord Macdonald.

" 2. At least this action is now barred by the limiting enactment " in the statute.

" 3. The action and whole reasons of reduction are farther " groundless in themselves, being either unsupported in fact or " irrelevant in law."

The Lord Ordinary, (*Cunninghame*,) after advising cases for the parties, " upon the third reason of reduction, founded on the " non-registration of the entail," pronounced the following interlocutor on the 14th January, 1840 :—" The Lord Ordinary " having heard counsel on the record, and thereafter considered " the revised cases, and whole process: In respect it is either " admitted on record, or otherwise proved by the documents

" produced,— 1*mo*, That Wentworth Lord Macdonald succeeded " to the tailzied estates specified in the libel, prior to the year " 1800, and that he possessed them under the tailzie alone, and " never wilfully violated any of the conditions thereof, previous " to his death in 1824; 2*do*, That in or about the year 1800, he " gave notice to his brother Godfrey, afterwards Lord Mac- " donald, then the next heir of tailzie, that he meant to perform " certain permanent ameliorations on the entailed estate, under " the act of 10 Geo. III. cap. 51, and that the said next heir " received the intimation and acknowledged the same as a notice " under the statute; 3*tio*, That the said Wentworth Lord Mac- " donald, for a series of years after the said period lodged annual " accounts of his meliorations, in obedience to the provisions of " the said act; 4*to*, That he obtained a decree of constitution " before this court in 1815, against his said brother and next " heir of tailzie, liquidating his claim for the advances made at " and prior to citation in that action, against which decree the " then defender entered no appeal in terms of the statute; 5*to*, " That the said Wentworth Lord Macdonald was succeeded in " 1824 by his said brother Godfrey, both in the entailed estates " and in the valuable unentailed property; 6*to*, That the said " Godfrey Lord Macdonald never complained of the said decree " on any ground during his brother's life, but soon after his " death he caused an action of reduction of the same to be " raised; which action was dismissed, first by Lord Moncrieff, " Ordinary, and afterwards by the Court, on the 17th day of " February, 1831, against which judgment neither the said " Godfrey Lord Macdonald, nor the present pursuer as his heir, " entered any appeal; 7*mo*, That it was not set forth as a plea " in the said action of reduction, that the prior decree of consti- " tution in 1815 was not authorized by, and did not fall within " the said statute in respect of the non-registration of the tailzie, " but that such plea, if competent, was omitted; 8*vo*, That the

" pursuer, on the whole, has failed to establish any ground on " which he should now be allowed to object, in respect of the non- " registration of the tailzie, to the meliorations constituted by the " said decree forming charges on the said estate, under the said " act. Under these circumstances, finds that the challenge " maintained by the pursuer in the present conjoined actions, in " so far as founded on the non-registration of the tailzie at the " date of the expenditure, is incompetent and irrelevant: " Therefore repels the first and second pleas urged by the " pursuer on record, and decerns; and appoints the cause to be " enrolled *quam primum*, that the other pleas on record may be " discussed."

The respondent reclaimed; and after Lord Probationer Ivory had delivered an opinion at great length, adverse to the interlocutor of the Lord Ordinary, the Court, (*First Division*,) on the 28th May, 1840, altered the Lord Ordinary's interlocutor, by one in these terms: — " The Lords having advised this reclaim- " ing note, and heard counsel for the parties, alter the interlocu- " tor reclaimed against, sustain the third reason of reduction, " and decern; but find no expenses due."

The appeal was against this interlocutor of the Court.

Pemberton and Anderson for the Appellants. — I. The policy of the 10 Geo. III. cap. 51, was to encourage the improvement of land, held under entail, by enabling the heir in possession expending money for that purpose, to charge the heir succeeding him in the lands with the payment of the greatest portion of the money to his representatives. The discouragement to the improvement of lands held under entail, prior to the passing of this statute, lay in the circumstance that the benefit of money spent in that way, might go to a succeeding heir of entail, no way, or distantly, related to the improver, to the prejudice of his own near relatives. This effect

took place equally whether the entail had been put upon record or not — the policy of the statute, therefore, was applicable to both of the cases, and there is nothing in its terms which can make it applicable to the one more than the other. No doubt, the heir, possessing under an unrecorded entail, required to borrow the money to make improvements; he had greater facility in doing so, inasmuch as he had the security of the lands to give to the lender, to whose diligence they would be open; but the great obstacle, which it was the policy of the statute to remove, still remained, the heir's aversion to make improvements out of his own purse, the benefit of which might redound to others. Accordingly, the expression of the 9th section is, that "every proprietor "of an entailed estate," without any qualification as to recording, or otherwise, who lays out money in improving the lands, shall be a creditor to the succeeding heirs of entail, for three-fourths of the amount, and all the other clauses are in the same general and unqualified terms. And the 23d section, by providing that no money expended in the improvements, should be the ground of adjudication of the lands, shews, that lands held under unrecorded entails were in the view of the legislature; for lands held under a recorded entail were, independently of the statute, free from the danger of adjudication.

The preamble of the 10th Geo. III. recites the act 1685, which requires the registration of entail, but that recital had reference only to those changes made in the law regarding questions between heirs of entail and third parties; not questions *inter hæredes* only, for as to them the act 1685 had no operation, Willison, *Mor.* 15369; Hall, *Mor.* 15373. *Ersk.* III. 8. 27. At all events, the enacting parts of the statute make no reference to the act 1685, or to the recording of the entail, and there is sufficient in the enacting clauses to satisfy the reference in the preamble, without making it applicable to the improvement clauses, more especially as these clauses have a special pre-

amble in the 9th section, where no mention is made of the act 1685.

II. If the 10th Geo. III. cap. 51. does not apply to lands possessed under an unrecorded entail, that is a defence which might have been stated against the decree of June, 1815, and which is now barred by the plea of competent and omitted. At all events, the decree of 1831, in Lord Godfrey's action, forms *res judicata* between the parties, and it is not now possible to challenge the decree of June, 1815, upon any ground which might then have been proponed.

III. This ground of reduction is farther excluded by the 26th section of 10 Geo. III. cap. 51, which declares, that decree in the action brought by the heir making the improvement shall be final, unless an appeal be brought within twelve months of its date. If a defence to the action may be brought forward at any distance of time, in the shape of a reduction of the decree, this will go far to do away the whole efficacy of the statute, the policy of which was to hold out an inducement to the making of improvements, that, within a certain limited time, what was done should be beyond the power of challenge; there is no distinction between this ground of challenge, and those founded on non-compliance with the provisions of the statute, in cases under recorded entails. In these last cases, the improvements, it has been argued, were not protected by the statute; but this argument has been disregarded, because the challenge was not made until after expiry of the statutory limitation; so, in the present case, though the provision of the statute may not have been complied with, in regard to recording the entail, and this was a good ground not for reducing the claim of the party making the improvements, but in the language of the statute of "setting it aside," the challenge comes too late to receive effect. Lindsay *v.* Anstruther, 12 *S.*

and *D.* 657; Johnstone *v.* Carlisle, 10 *S.* and *D.* 657; Macdonald *v.* Macdonald, 9 *S.* and *D.* 460.

Solicitor General, and Bruce, for the respondents.— I. The title of the statute 10 Geo. III. cap. 51, is for the improvement of lands held under settlements of "strict entail;" but an unrecorded entail, whatever may be its effect *inter hæredes*, is not a strict entail, or in any way effectual against third parties, *Ersk.* III. 8. 25, Ross *v* Drummond, 14 *S. B.* and *D.* 454. Heirs therefore possessing under an unrecorded entail, did not require the inducements or the protection held out by the statute; it was within their power effectually to burden the lands with the expenses of improvements. Accordingly, the preamble of the statute speaks of tailzies, "completed and published in the manner directed" by the act 1685, and of the impediment to the improvement of the lands, so long as the law allowing "such entails" subsists; and all the enacting clauses, particularly the 15th, are expressed in terms which can only apply to recorded entails, and the 23d section, so far from affording evidence that unrecorded entails were intended to be embraced, does the reverse; for if the statute did so apply, it would work this injustice, that if a creditor, trusting to the absence of any entail upon the record, should lend money to an heir in possession, and he should apply it in improving the estate, the creditor would be exposed to the loss of one-fourth at least of his money, under the clause declaring that only three-fourths should be chargeable against the succeeding heirs, and this twenty-third section prohibiting adjudication; while in another view, the heir succeeding to the party making improvements, might be exposed to this hardship, that after making the improvements, the heir in possession might borrow and expose the lands to eviction, and yet the heir entitled to succeed to him would remain personally liable under the statute for the expenses of the improvements, although the estate was gone from

him. But this question was deliberately determined in favour of the respondent's argument, Paget *v.* Earl of Galloway, 15 *S.* and *D.* 667.

II. Reduction is not barred by the limitation in the 26th section of the statute. The statute only applies to a certain class of persons, and no other therefore can claim the benefit of the limitation. If the party making the improvement is within the class contemplated by the statute, he is within its policy, and professing to act, and ostensibly acting under the statute, those who challenge his acts must do so within the time allowed by the statute, otherwise its object would be defeated, and the encouragement it intended to offer for the expenditure of money would be greatly impaired. But persons like the appellant not coming within the class contemplated by the statute, are not within its policy, and no way protected by its litimation.

III. If the statute does not apply to heirs possessing under unrecorded entails, then the decree of June, 1815, is an ordinary decree, liable to be opened up within the long prescription; and inasmuch as it was obtained in absence, without any pleas in defence having been stated, the plea of competent and omitted cannot have any place; and with regard to this particular ground of reduction not having been taken in the action of reduction brought by Lord Godfrey, competent and omitted has place only against defenders not against pursuers bringing different actions on different *media concludendi*, Paton *v.* Stirling, *Mor.* 12,229; *Ersk.* IV. 3; *Stair.* IV. 40, 16.

LORD CAMPBELL. — My Lords, This was an action of reduction commenced by the present Lord Macdonald, heir of entail of certain estates in Skye and Uist, against the executors of the

late Alexander Lord Macdonald, to set aside a decree obtained by him, in the year 1815, constituting a sum of L.9643, a debt upon the entailed estates, as being three-fourths of certain sums laid out by him upon them in permanent improvements, under statue 10th of George the 3rd, chapter 51, commonly called the Montgomery Act.

The chief ground for the reduction now relied upon, was, that at the time of this charge, the entail had not been recorded, and that the statute does not apply to an unrecorded entail.

Three defences were set up, — First, That the action was brought too late, as by the 26th section of the act the decree became final, there being no appeal against it within twelve months after it was pronounced. — Secondly, That there having been a former action to reduce the decree, in which this ground was not taken, and which failed, the maxim of "competent and omitted" applies, and the plea of *res judicata* is a bar. — Thirdly, That the statute does extend to unrecorded entails.

The Lord Ordinary, Cunninghame, intimated an opinion in favour of the defenders on all these defences. But, on a reclaiming note to the First Division of the Court of Session, they were all overruled, and the reason of reduction that the entail was not recorded, was sustained. The present appeal is against this interlocutor.

The interlocutor is, according to the opinion of Lord Probationer Ivory, who proposed it in a very learned judgment, shewing his high qualifications for the office of judge, and was unanimously concurred in by the Lord President, Lord Gillies, Lord Mackenzie, and Lord Fullerton. The House has taken time to consider, not from any difficulty felt during the argument, but from the great importance of the main question to the law of Scotland, and from due respect to the opinion of so great a judge as Lord Cunninghame. But after the best attention I have been

able to bestow upon the subject, I cannot hesitate to advise your Lordships to affirm the interlocutor appealed against.

First, the limitation in the 26th section of the act is expressly confined to cases where money has been laid out under the authority of the act, and the object of the limitation is declared to be to ascertain definitively the amount of the sums so laid out, so that there may be no dispute upon that subject when material witnesses are dead, "for remedy whereof the decree, if pro- "nounced by the Court of Session, shall be final, if an appeal is "not brought within twelve months." I humbly conceive, my Lords, that this enactment cannot possibly apply to a case where the money has not been laid out under the authority of the act, and there being no dispute as to amount, the ground of reduction is that there was no authority under the statute to charge the entailed estate with any part of the debt.

Secondly, I think the dicta from institutional writers, and the decisions brought before us, are conclusive to shew, that the doctrine of "competent and omitted" applies only to defenders who cannot challenge a judgment regularly pronounced against them, on the ground that there was a defence, which it was competent to them, but which they omitted to set up. With regard to pursuers, on the other hand, in proceedings of this nature, there may be as many actions of reduction as there are *media concludendi*; a pursuer cannot a second time set up a ground of reduction, on which there has been judgment against him. But this is no bar to his bringing a fresh action on a totally different ground of reduction, although both might have been included in the first action.

This brings us therefore to the great question upon the construction of statute 10 Geo. III., chapter 51, and I am of opinion, that the provisions of that statute respecting the burdening of an entailed estate for improvements, do not apply where the entail

had not been recorded. It is impossible to extend them to every entail, for wherever the settlement of an estate by simple destination departs in any particular from the common law line of descent, without any conditions, forfeitures, or fetters whatsoever, it is in one sense an entail. But, looking to the title, the preamble and the enactments of the statute, I think it is confined to lands held under "strict entail," and that lands cannot properly be said to be held under "strict entail," where the deed of entail is unrecorded. An unrecorded entail does not seem to have been in the contemplation of the Legislature in passing this act. Where the entail is unrecorded, the estate may be alienated, and the heir of entail may raise what money he pleases upon it for improvements, or any other purpose. If he wishes to have the benefit of the statute, and to raise money without incurring an irritancy, he has only to record the entail. The Legislature meant to relieve proprietors of estates, bound by the fetters of a strict entail, who were precluded from charging it with any debt for any purpose beyond the usual permission expressly given to provide for wives or children.

Great injustice might follow from any other construction of the act, for though it supposes that the proprietor, in the first instance, will lay out his own money in improvements, it likewise supposes that he will assign the security he obtains on the entailed estates; and if the proprietor of an entailed estate, the entail being unrecorded, might obtain the security, and assign it to a person who advances him money upon it, the assignee might be injured by the competition of general creditors, with whom the heir of entail subsequently contracts debts. In practice, it makes no difference whether money is lent to improve, and security is directly given to the lender, or the security is given to the proprietor of the estate, and he assigns it to the lender. The object of the legislature cannot be fully accomplished, unless the person who lends

the money on the faith of the security, has a prior charge as against any subsequent creditors; which he would not have if the entail were unrecorded, and the estate might be adjudged by common process of law.

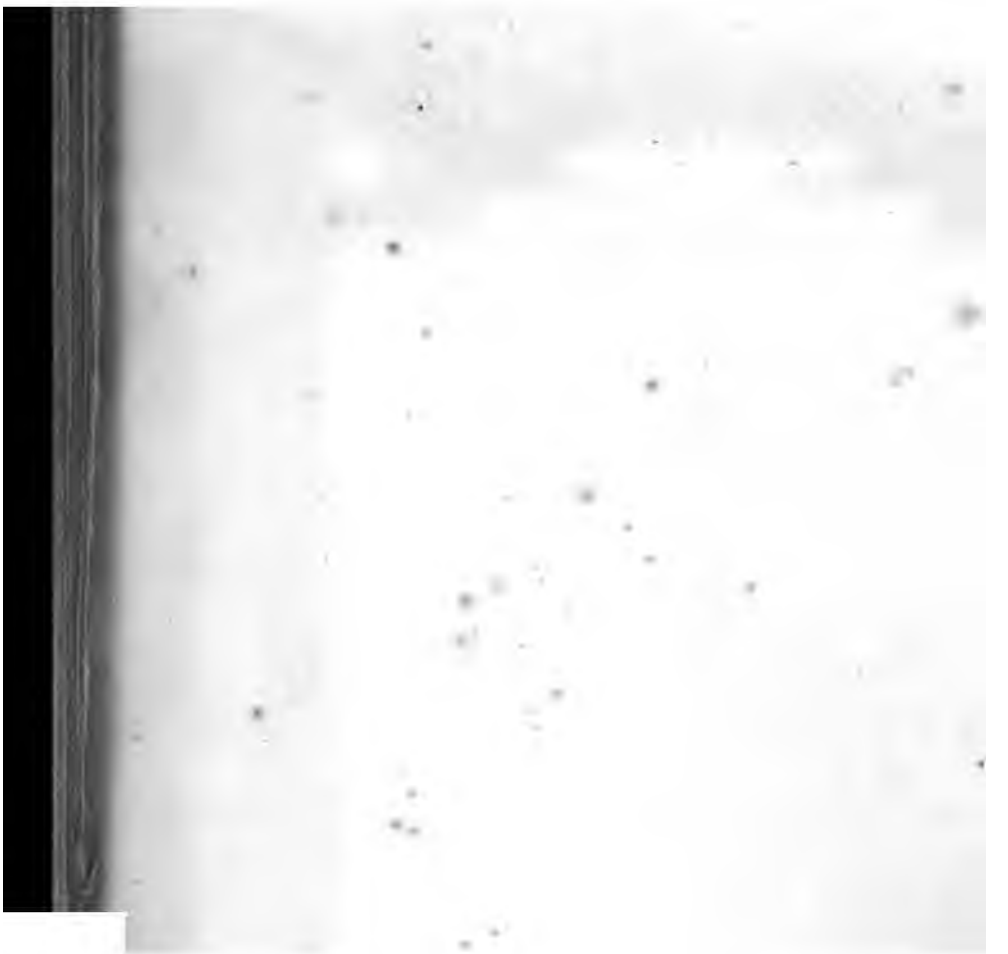
I therefore think, that in the case of Paget v. Lord Galloway, and in this case, the right construction was put upon the statute by the Court below, and that the interlocutor appealed against, should be affirmed with costs.

Lord Brougham. — My Lords, I entirely agree with my noble and learned friend in the view he has taken of this case. He has correctly stated,—my recollection entirely agrees with his,—that it was not so much from any grave doubts we entertained upon the point at the argument, as on account of the authoritative opinion delivered by that most learned and able judge, Lord Cunninghame, (the Lord Ordinary,) whose interlocutor was altered, I believe, by the unanimous concurrence of the other judges, including the very able judge then acting as Probationer, who gave his probationary judgment upon this case.

My Lords, I have the authority of my noble and learned friend the Lord Chancellor, for stating, that he entirely concurs in the view we take of this case, and had he been able to be present, — he is prevented by official duties elsewhere, — he would have concurred entirely in the proposition of my noble and learned friend, that the interlocutor appealed from be affirmed.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed, and that the said interlocutor therein complained of, be, and the same is hereby affirmed. And it is hereby farther ordered, that the appellants do pay, or cause to be paid to the said respondent, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant. And it is also farther ordered, that unless the costs certified, as aforesaid, shall be

paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills, during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

TILLEARD and SON — HAY and LAW, Agents.

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